Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT GREENSPÁN, D.D.S., P.C.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Did the United States Court of Appeals for the Second Circuit correctly grant enforcement of a Decision and Order of the National Labor Relations Board ("NLRB") which held that the Petitioner's withdrawal of recognition of a labor union representing certain dentists employed by the Petitioner violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("the Act")?

2. Did the United States Court of Appeals for the Second Circuit correctly grant enforcement of a Decision and Order of the NLRB which held that certain dentists employed by the

Petitioner and represented by a labor union were "employees" rather than "supervisors" within the meaning of section 2(11) of the Act, in view of the fact that the dentists were found by the NLRB to have the authority to effectively recommend the transfer of certain other employees?

Parties To The Proceedings Below

In addition to the parties listed in the caption, Doctor's Council, a labor union, was a party to the proceedings below. Doctor's Council was represented by Pryor, Cashman, Sherman & Flynn, 410 Park Avenue, New York, New York 10022.

Citations Of Opinions And Orders Below

1. *Robert Greenspan, D.D.S., P.C.,* 1996 U.S. App. LEXIS 3946 (2d Cir. March 5, 1996)

2. *Robert Greenspan, D.D.S., P.C.,* 318 N.L.R.B. No. 5, 149 LRRM 1324 (BNA) (JULY 31, 1995)

Jurisdictional Statement

Review is sought of the Summary Order of the United States Court of Appeals for the Second Circuit which was entered on March 5, 1996. Jurisdiction to review the Summary Order is expressly conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

Petitioner has filed a petition for rehearing with a suggestion for rehearing *en banc* which remains pending before the United States Court of Appeals for the Second Circuit.

Statutes Involved

29 U.S.C. § 152(11) provides as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline, other employees, or

> responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. §§ 158(a)(1) and (5) provide as follows:

(a) Unfair labor practice by employer

It shall be an unfair labor practice for an employer

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Statement Of The Case And Basis Of Federal Jurisdiction

Jurisdiction in the court of first instance (in this case the United States Court of Appeals for the Second Circuit) was based on Fed. R. App. P. 15(a) as specifically conferred by 29 U.S.C. § 160(f).

This case raises the question of whether dentists, who were found to have the authority to effectively recommend the transfer of their dental assistants, are statutory employees or "supervisors" within the meaning of § 2(11) of the Act.

If the dentists are employees, then the Petitioner violated the Act by withdrawing recognition of their labor union, and must bargain collectively with the union. If the dentists are supervisors, however, they are not protected by the Act and the Petitioner's failure to bargain with the union did not violate the Act.

The administrative law judge ("ALJ") found that the dentists had the authority to effectively recommend the

transfer of their dental assistants, a factor expressly stated in the Act as determinative of supervisory status. Rather than applying the plain meaning of § 2(11) of the Act, and finding the dentists to be statutory supervisors, the ALJ disregarded his own finding and proceeded to examine the frequency with which this authority was exercised. After considering and weighing the frequency of the exercise of this authority, the ALJ held that the dentists were employees and accordingly found that the Petitioner's withdrawal of recognition of the union violated the Act. On review, the NLRB adopted the ALJ's Order. On appeal, the Second Circuit denied the Petitioner's request for a reversal of the NLRB and granted the NLRB's request for enforcement.

Reasons Relied On For Allowance Of The Writ

The United States Court of Appeals for the Second Circuit has decided a question of federal law by rewriting § 2(11) of the Act. More particularly, Congress has determined that the presence of any one of the twelve indicia of supervisory authority, which are expressly set forth in § 2(11) of the Act, renders one a supervisor who is not entitled to the Act's protections. The Court of Appeals for the Second Circuit has enforced a decision of the NLRB which added an additional requirement - the frequency with which that authority is exercised - to the otherwise clear definition fixed by Congress.

By so doing, the Court of Appeals for the Second Circuit has effectively rewritten § 2(11) of the Act to require a two-step analysis to determine whether an individual is a supervisor. According to the Second Circuit, it must first be determined whether any of the criteria set forth in § 2(11) are present. If so, then the frequency that their authority is exercised must be examined. Only if the authority is exercised with sufficient frequency will the individual be deemed a supervisor. This holding contravenes the plain reading of § 2(11) which deems anyone who possesses any of the indicia set forth in § 2(11) of the Act a supervisor, regardless of the frequency that their authority is exercised.

The following documents annexed hereto are submitted herewith as the Appendix, in accordance with Rule 14(i) of this Court:

Exhibit A: March 5, 1996 Summary Order of the United States Court of Appeals for the Second Circuit

Exhibit B: July 31, 1995 Decision and Order of the National Labor Relations Board

Exhibit C: May 22, 1995 Decision of Administrative Law Judge Joel P. Biblowitz

Dated: New York, New York
May 17, 1996

Respectfully submitted,

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/s/ Ira Drogin

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APPENDIX

NLRB
2-ca-27907

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

As stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5 day of March one thousand nine hundred and ninety-six.

PRESENT: HONORABLE J. DANIEL MAHONEY,
HONORABLE JOHN M. WALKER, JR.,
HONORABLE GUIDO CALABRESI,
Circuit Judges.

UNITED STATES
COURT OF APPEALS
FILED
MAR 05 1996
GEORGE _____
SECOND CIRCUIT

ROBERT GREENSPAN, D.D.S., P.C.,

Petitioner-Cross-Respondent,

-against- **Nos. 95-4138**
95-4152

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

APPEARING FOR PETITIONER: Ira Drogin, New York, New York.

APPEARING FOR RESPONDENT: William A. Baudler, Attorney, National Labor Relations Board, Washington, D.C.

Petition for review, and cross-petition for enforcement, of an order of the National Labor Relations Board

This cause came on to be heard on the transcript of record from the National Labor Relations Board and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board be and it hereby is ENFORCED.

1. Petitioner-cross-respondent Robert Greenspan petitions for review of a decision and order of the National Labor Relations Board (the "Board") dated July 31, 1995 which determined that Greenspan had engaged in unfair labor practices in violation of § 8(a)(1) and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(1) and (5), by withdrawing recognition from and refusing to bargain with the Doctors Council, a union representing dentists employed by Greenspan, and ordered him to recognize and bargain with the Doctors Council. Greenspan argues that the Board erred in

determining that the dentists represented by the Doctors Council were "employee[s]," and not "supervisor[s]" within the meaning of § 2(3) of the Act, 29 U.S.C. § 152(3).

2. We deny Greenspan's petition for review and grant the Board's cross-application for enforcement substantially for the reasons stated in the decision and order of the Board (incorporating the recommended order of Administrative Law Judge Joel P. Biblowitz). *See Rooert Greenspan, D.D.S., P.C., P.C.* 318 N.L.R.B. No. 5 (July 31, 1995).

/s/ J. Daniel Mahoney

Hon. J. Daniel Mahoney, U.S.C.J.

/s/ John M. Walker, Jr.

/s/ Hon. M. Walker, Jr., U.S.C.J.

/s/ Guido Calabresi

Hon. Guido Calabresi, U.S.C.J.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Robert Greenspan, D.D.S., P.C. ***and*** **Doctors Council.** Cases 2-CA-27907 and 2-CA-28304

July 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On May 22, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed an exception and a supporting brief. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions as further discussed below and to adopt the recommended Order.

1. We agree with the judge, for the reasons set forth by him, that the bargaining unit dentists employed by the Re-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no bais for reversing the findings.

spondent are not supervisors within the meaning of Section 2(11) of the Act. We note additionally that the record evidence establishes that in at least two instances the Respondent granted the request of a dental assistant to transfer to work with a different dentist because of the assistants' complaints of an unsatisfactory relationship with the dentist to whom they were originally assigned. This evidence that the dentists and their assistants essentially have reciprocal rights to request transfers further supports the judge's conclusion that the dentists' authority to recommend that a dental assistant be transferred is a means of ensuring compatibility among employees who work closely together rather than an indication of supervisory status under Section 2(11) of the Act. As the judge found, "the evidence establishes that once a dental assistant is assigned to work for a particular dentist, that is considered to be a permanent assignment absent any disagreements that cause *one or the other* to ask for, or demand, a reassignment." (Emphasis added.)

We further agree with the judge's alternative finding that the dentists' authority to recommend transfer is exercised too infrequently to establish supervisory status. We note in particular that of the four instances set forth in the record in which such authority was exercised, two occurred several months *after* the Respondent claimed in August 1994 that the dentists were supervisors and withdrew recognition from the Union. Those transfers occurring subsequent to August 1994 are of limited probative value in supporting the Respondent's affirmative defense that it believed the dentists to be supervisors at the time it withdrew recognition from the Union in August 1994. Even considering all the record evidence, as did the judge, we agree with his conclusion that the dentists' authority to recommend transfer is exercised too infrequently to establish supervisory status.

2. We further agree with the judge, for the reasons set forth by him, that the Respondent did not unlawfully threaten employees with closure of the Respondent's facility. The General Counsel has excepted to this finding and contends that the Respondent unlawfully threatened that its sole client

"would close the facility because he would not deal with the Union." The judge discredited the latter testimony, however, and the record evidence is consistent with this credibility resolution. The General Counsel's exception is accordingly meritless.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Robert Greenspan, D.D.S., P.C., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 31, 1995

William B. Gould, IV,	Chairman
James M. Stephens,	Member
Margaret A. Browning,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Burt Pearlstone, Esq., for the General Counsel.
Ira Drogin, Esq. and *Laurent Drogin,* for the Respondent.
Richard M. Betheil, Esq. (Pryor, Cashman, Sherman & Flynn), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in New York, New York, on April 20 and 21, 1995. The consolidated complaint, which issued on March 31, 1995, was based on unfair labor practice charges filed by the Doctors Council (the Union) on October 24, 1994[1], and March 28, 1995. The complaint alleges that on about August 24, Robert Greenspan, D.D.S., P.C. (Respondent), withdrew recognition from the Union as the exclusive bargaining representative of the dentists that it employs, and since that time has failed to recognize and bargain with the Union. The complaint further alleges that subsequent to August 22, Respondent bypassed the Union and dealt directly with its employees concerning wages and other terms and conditions of employment, and on about September 6, Respondent unilaterally instituted wage increases of $32 a day for its unit employees. Finally, the complaint alleges that on about March 14, 1995, Respondent, by Robert Greenspan, D.D.S., its owner, agent, and supervisor within the meaning of the Act, informed its employees that its facility would be forced to close if the Union prevailed in its charges filed with the Board. By Order dated March 21, 1995, Lawrence M. McKenna, district judge for the United States District Court for the Southern District of New York, granted the Board injunctive relief pursuant to Section 10(j) enjoining Respondent from engaging in the actions alleged,[2] except for the alleged

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[1] Unless indicated otherwise, all dates referred to relate to the year 1994.

[2] Judge McKenna, in his memorandum and order, stated that the injunctive provisions shall have no further force and effect after June 30, 1995, unless the Administrative Law Judge shall have rendered a decision on this matter on or before that date, and that, should there be an appeal from that decision, then the injunction provisions would have no further force or effect after September 8, 1995, unless the NLRB shall have rendered a decision on the appeal by September 8, 1995.

threat to close. The charge alleging that violation was filed after the Judge's Order issued.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent Admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Prior to August 22, the Union had been the recognized collective-bargaining representative of the dentists employed by Respondent for over 10 years. The last collective-bargaining agreement between the parties expired on December 31, 1993. Negotiations for a new collective-bargaining agreement had commenced when counsel for Respondent wrote to the Union by letter dated August 22:

> In view of the decision of the United States Supreme Court on May 23, 1994, in *National Labor Relations Board v. Health Care and Retirement Corporation of America* [114 S.Ct. 1778 (1994)], my client will not engage in collective bargaining negotiations with your Union concerning the dentists he employs, for the reason that those dentists are supervisors within the meaning of Section 2(11) . . . of the National Labor Relations Act.

Since that time, Respondent has refused to recognize or bargain with the Union as the collective-bargaining representative of its dentists, claiming, as stated in the August 22 letter, that they are supervisors as defined in the Act. In fact, Respondent admits that, subsequent to August 22, it bypassed the Union and dealt directly with its dentists concerning

wages and other terms and conditions of employment, and that on about September 6, it unilaterally instituted wage increases of $32 (with the exception of one employee who received $16) a day to its dentists.

The dental clinic in question is located at One Penn Plaza in the City and State of New York (the facility). Respondent has provided dental services to the members of, or participants in, New York Hotel and Motel Trades Council and Hotel Association of New York City, Inc. Dental Fund (the Dental Fun), for a number of years pursuant to agreements with the Dental Fund. The last such agreement (the agreement) was executed by Respondent on May 27 and was effective for the period December 1, 1993, until December 31, 1995. The patients cared for pursuant to this agreement represent 100 percent of Respondent's business. In addition to the 10 dentists employed by Respondent at the facility, there are 3 dental specialists (not in the unit), 5 clerical receptionists, a sterilization assistant, an x-ray assistant, 3 hygienists, and about 15 dental assistants.[3] In addition to Dr. Greenspan, Dr. Findberg, the chief of staff, and Mila Gutterman, the office manager, are present at the facility. It is the dentists' working relationship with the dental assistants that was the principal subject of this hearing.

A. *Dentists and Dental Assistants*

The dentists at the facility perform normal dental care. Dr. Michael Kozic testified, "I treat patients in general routine dentistry. I do cavities, fillings, root canals, extractions, make bridges and crowns. General dentistry." The dental assistant is the other part of the "four handed sit-down dentistry." There is no conflict between the testimony of Drs. Kozic and

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[3] Respondent's office clerical employees, dental hygienists, x-ray technicians and dental assistants have been represented by Local 153, Office and Professional Employees International Union, AFL-CIO (Local 153), since about 1989. The most recent collective-bargaining agreement covering this unit is effective from June 1, 1994, through May 31, 1996.

Greenspan regarding the dental assistants' duties; as Greenspan's testimony is more complete, it follows:

> She has the functions that start before the patient is in the operatory. She has functions that take place while the patient is in the operatory. And she has functions after the patient leaves the operatory.
>
> Before the patient arrives, she has duties, as far as putting appropriate guards, getting instruments, sterilize hand pieces, things of the nature that she does independently of the doctor.
>
> Then she goes out and brings the patient in from the waiting room to the operatory. She seats the patient, places a bib on them.
>
> From that point forward, her functions with the doctor are, as . . . a second set of hands. She'll retract tissue, she'll mix materials, she'll aspirate fluids . . . when she's not present, its very difficult to . . . perform procedures. She's essentially part of a team that works on the patient.
>
> When the doctor is finished with those procedures, the patient will be brought to the waiting room . . . and she will have functions with regard to cleaning up the operatories-bringing the non-sterile instruments to central sterilization . . . and preparing the operatory for the next patient.

When the dental assistants are not working directly with a dentist, they are doing what Dr. Kozic referred to as "miscellaneous duties," such as cleaning out the suction machines and the labs and breaking down empty cartons. In addition, one dental assistant performs the sterilization work at the facility. Gutterman makes the assignments of the dental assistants to these miscellaneous duties, as well as assigning dental assistants to particular dentists. In fact, the evidence establishes that once a dental assistant is assigned to work for a particular dentist, that is considered to be a permanent assignment absent any disagreements that cause one or the other

to ask for, or demand, a reassignment. There is a large discrepancy in the longevity of the partnerships of dental assistants to dentists. Kozic, who has been employed by Respondent for 15 years, testified that during this period he has worked with about 50 dental assistants. Although the evidence establishes that he is difficult to get along with, certainly most of these assistants were meant to be temporary, such as when his regular assistant was absent. On the other hand, Dr. Elisa Mello, who has been employed by Respondent for almost 2 years, has had four dental assistants assisting her. Both Drs. Kozic and Mello testified that Gutterman and her predecessor, Meri Pifko, assigned the dental assistants to them without any input from the dentists.

Dental assistants make arrangements for vacations, personal days, and sick days with the office manager: the dentists have no input in these issues. The parties stipulated that Respondent's vacation request form has a signature line stating "Personnel Department" containing the signatures of Pifko, Gutterman, Greenspan, or no signature. Dr. Kozic testified that he works overtime during his regular lunch hour from 12:30 to 1:30 p.m. a couple of times a week, seeing patients. He asks his dental assistant if she would also work on those occasions: "If she wants to work lunch, she can work lunch. If she doesn't want to work lunch, I can't make her work lunch." On most of the occasions, his dental assistant has worked overtime pursuant to his request, and was paid for the overtime work. Respondent's contract with Local 153 provides that the dental assistants and others in the unit shall work 7-hour days and 35-hour weeks, and that all work in excess of that is to be paid at time and a half. The contract further provides: "All employees shall work a reasonable amount of overtime each week if required by the Employer."

As stated above, there is a dental assistant assigned to each dentist at the facility. The evidence establishes that during most of the procedures performed by the dentists at the facility, the assistance of the dental assistant is needed. There are times, however, when the dentist is performing a procedure when the services of the dental assistant are not needed. Dr.

Kozic testified that on these occasions his dental assistants usually perform other tasks on their own. If they do not, he suggests other work for them to perform: "If you want to supply the room now, supply the room." In these situations, he has released the dental assistant to answer or make a telephone call, and he has observed other dentists doing that as well. He has also observed other dentists releasing dental assistants to get a cup of coffee. He has not done so: "She's not chained to the chair. I'm not releasing anybody." Dr. Greenspan testified that if the dentist is performing an operation that does not require the services of the dental assistant, the dentist has the authority to give the dental assistant time off until she is needed again, and this occurs regularly at the facility. If a dental assistant is paged for a telephone call, his experience is that the dental assistant usually asks the dentist if she can take the call. If the dentist is performing a procedure in which the dental assistant is not needed, she may take the call without first asking. Dr. Mello testified that when she is performing a procedure in which she does not need the dental assistant, she has the authority to release the assistant to have a cup of coffee. She also has the authority to tell the dental assistant whether she can leave the operatory to answer, or make, a telephone call. If the dental assistant tells her that she wants to make a telephone call at a time when she was assisting in a procedure or is about the bring in a patient, Dr. Mello would ask her to "explain to me what the necessity of the call is. And if I deem it important, I'll say, okay, go ahead." Dr. Jaim Oro, who has been employed by Respondent as a dentist for 4 years, testified that when he is performing a procedure that does not require the services of his dental assistant, he usually asks the assistant to perform some other task such as getting his files for his work on the following day. He also has the authority to release the dental assistant to have a cup of coffee, and has done so. He also has the authority to tell the dental assistant whether she may make or receive a telephone call, and has exercised this authority as well.

Because dental assistants are assigned to work with a particular dentist, situations occur fairly regularly when a dental assistant is absent for a day and the dentist has to obtain a

replacement to cover for the absent dental assistant. Dr. Kozic testified that when his dental assistant was absent for a day, he had three options: almost half of the time he would ask Gutterman (or her predecessor, Pifko) to assign another dental assistant to him. His second option, also less than half of the time, was to only perform procedures that he could do by himself. His final option, about 10 percent of the time, was to attempt to borrow a dental assistant to help him. On those occasions, when he sees that the dentist and the dental assistant are in the operatory with no patient in the chair, he asks the dental assistant (rather than the dentist) if she would help him with his patient. If the dental assistant refuses, he asks Gutterman to assign a dental assistant to work with him. Dr. Greenspan testified that on some mornings when he arrives at the facility there is a message that a certain dental assistant will not be in to work that day. If a dentist is also absent that day, he or Gutterman assigns the two partnerless individuals to work with each other that day. When there are more dentists than dental assistants at work, the dentists will usually work it out amongst themselves. The dentist whose dental assistant is absent goes to the staff lounge, and if any dental assistant is there taking a break or having coffee, the dentist will ask the dental assistant to help him with a procedure. If no dental assistant is obviously available, or refuses the dentist's request, the dentist then asks one of the other dentist whom he sees is performing a procedure that does not require the dental assistant to borrow his dental assistant, and the dentists have the authority to release their dental assistant to assist another dentist. Dr. Mello testified that there have been occasions when other dentists at the facility did not have a dental assistant and needed one for a procedure in which a dental assistant was critical, and have asked her if they could use her assistant. If she did not need her assistant at that time, she told her to help the dentist, "because I don't really need you right now and they do." She has done this without first telling Dr. Greenspan or Gutterman. In addition, a couple of times a month, she has asked another dentist at the facility to borrow his dental assistant. She testified that in her 2 years of employment prior to August, her dental assistants were absent

from work on about seven occasions, but they were also absent for portions of a day that required her to obtain a replacement. The first thing that she does when she learns in the morning that her dental assistant would not be at work is to ask Gutterman if a dental assistant is available to work with her for the day. On some of those occasions Gutterman assigned another dental assistant to work for her for the day. On other occasions, Gutterman told her to see if she could find a dental assistant to assist her.

It is clear that the dentists at the facility do not have the authority to hire or fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees on their own. In addition, they have no access to employee files at the facility and have no authority to issue written warnings to employees. There is an issue, however, of whether they have the authority to effectively recommend the discipline or transfer of employees.

Dr. Kozic testified that he was never told that he had the authority to recommend the promotion, discharge, transfer, or layoff of an employee at the facility. Dr. Greenspan testified about Ruth Ladson, a dental assistant who was suspended in February 1991 and terminated in September 1991. Ladson's file contains a letter dated February 21, 1991, from Dr. Greenspan notifying her of her suspension and final warning. The letter states that on three occasions over the prior 2 weeks, Pifko and Dr. Wexley spoke to her about her inadequate job performance, but that it had not improved. In fact, 2 days earlier, she had failed to conform to the proper infection control procedures. When asked what input Dr. Wexley had in Ladson's termination, Dr. Greenspan testified:

> Dr. Wexley's input was total. I don't work with each assistant. We don't have a regular program with me supervising them or — or looking at their skills. I rely solely on what the doctors say about the assistants with regard to what action to take, with regard to their performance. If Dr. Wexley

> hadn't brought this to my attention, I probably would still not know about it.

Dr. Greenspan also testified about Marcia Williams, a dental assistant, who was suspended on January 13, 1993. The letter notifying her of the suspension states that he and Dr. Mello have previously spoken to her about her "unprofessional and lackadaisical performance." Subsequent to this suspension, Dr. Mello told Dr. Greenspan that she didn't want to work with Williams. His normal practice is to grant such requests, but none of the dentists wanted to work with Williams, so she was transferred to another job at the facility and was terminated 3 months later.

Gail Vetrone (formerly Gail Rahaley) testified that she has been employed as a dental assistant at the facility for 2 years. During 1993 she was the dental assistant for Dr. Kozic in 1993. In November 1993 she filed a grievance with Local 153 alleging that Kozic "is impossible to work for." She stated in the grievance, and testified, that he used to threaten her by saying that if she did not work for him, she was out of the door, or would not work at all. She requested a transfer to a different dentist and was subsequently transferred to work for another dentist at the facility. Dr. Kozic testified that he told Vetrone that if she continued to speak on the phone, he would do something about it; he believed that he had the authority to warn her because: "she interrupted patient care." The day after Vetrone was transferred to a different dentist, Dr. Kozic wrote a letter to Dr. Greenspan objecting to the transfer. He testified that, aside from spending too much time on the telephone, she was a good dental assistant.

The most frequent form of "discipline" at the facility appears to be the transfer of dental assistants from one dentist to another or from one dentist to another position at the facility. Dr. Mello testified about her relationship with Marcia Williams who was terminated in 1993 as described above. She testified that Williams was her dental assistant; however, she did not pay attention to what Dr. Mello was doing and was not properly assisting her. She spoke to Williams about it on

three occasions, telling her that she had to pay attention to her work and not talk to other people or look at a book during the procedures. Although she had not been specifically told that she could give her such a warning, she felt that she had this authority: "We have a working relationship. She is supposed to be assisting me. She wasn't doing it." The next time that Williams did not pay attention to her work, Dr. Mello spoke to Dr. Greenspan about her problems with Williams: "I can no longer work with her. She is not helping me." About a half hour later, she was transferred and assigned to a sterilization job at the facility. Dr. Oro testified about a situation with Symenthia Finley, who had been employed at the facility as his dental assistant. She was not performing her job properly in that she was not getting the patients from the waiting room, properly sterilizing the room, or giving him the instruments. He spoke to her and told her that unless her work improved, he would discuss it with Dr. Greenspan. Her work improved for a brief period, and then "she went back to her old ways." Dr. Oro then discussed Finley's performance with Dr. Greenspan and Finley's performance again improved for a brief period. About a month or two later, when Finley's performance again deteriorated, Dr. Oro went to Dr. Greenspan, said that he did not want to work with Finley anymore, and asked for a different dental assistant. Dr. Greenspan said that he would do something about it and he immediately made that change.

There was testimony about Troy Branch, a dental assistant who worked with Dr. Kozic at the facility in about 1992. Dr. Kozic testified that Branch was always on the telephone, either making or receiving calls. He kept track of Branch's calls noting that in a 1-hour period he had four telephone calls. He spoke to Branch about the telephone calls and may have threatened that he would have him fired. He testified that while he may have made this threat, he did not believe that he had the authority to effectively recommend that employees be disciplined. He may have said it because he was upset that nothing had been done about Branch's telephone calls. When the situation did not improve, he then wrote a letter to Dr. Greenspan stating that he was upset that Branch spent too

much time on the phone and that it disrupted his patient care. He asked Dr. Greenspan to tell Branch to stay off the phone. Shortly thereafter, Drs. Greenspan and Kozic met with Branch and Dr. Greenspan told him to stay off the phone. Branch continued to spend a lot of time on the phone, and a few months later, when Dr. Kozic reported for work, he learned that Branch was transferred to a different dentist. Dr. Greenspan testified that Dr. Kozic complained to him about Branch spending too much time on the telephone, and asked him to talk to Branch about his telephone calls, which he did. Dr. Kozic did not ask him to discipline Branch. Shortly thereafter, Dr. Kozic told him that the problem with Branch was continuing, and showed him a log of Branch's telephone calls. Dr. Greenspan said that he would speak to Branch again, which he did. Subsequently, Branch filed a grievance with Local 153 alleging that Dr. Kozic was harassing him, and he transferred Branch because it was obvious that he and Dr. Kozic could not work together.[4]

Dr. Kozic testified further that on another occasion, when Vetrone was his dental assistant, at a time that he was prepared to begin a procedure, she received a telephone call and remained on the phone for 10 minutes. When he could not get her to get off the phone, he told Gutterman of the situation, and she sent another dental assistant to work with him on the procedure. Sometime thereafter (as discussed more fully above) Vetrone was transferred to work with another dentist. Dr. Kozic testified that this transfer was made without his prior knowledge. He testified further that, within the last year, while he and his dental assistant were working, Finley came into the operatory and began talking to his assistant. He asked Finley to leave and she told him that he could not tell her

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[4] Prior to this situation, in January 1992, Greenspan gave Branch a written warning for latenesses. This warning does not mention Dr. Kozic. On March 6, 1992, he received another written warning from Dr. Greenspan, this time for his excessive telephone calls during working hours. This warning refers to the difficult situation that the phone calls have created for Dr. Kozic.

what to do. When he again asked her to leave she commented in an obscene way that he could not tell her what to do. Dr. Kozic then told Dr. Greenspan about what had occurred and he said that he would take care of it. He saw Dr. Greenspan speaking to Finley and she left his room. Dr. Greenspan later told him that he told her to stay out of his room. Dr. Kozic did not ask that Finely be disciplined for the incident, and she was not disciplined. During his 15 years of employment with Respondent Dr. Kozic has made a couple of requests that dental assistants be transferred; although he was never specifically told that he had this authority, he did it because, "I thought it was part of my job."

Dr. Greenspan testified that in November, Dr. Peterson, one of the dentists at the facility, complained that dental assistant Nicolette Brown was rude and didn't show him the proper respect; he asked that she be transferred. In December she was transferred to Dr. Oro. Shortly before this transfer, Dr. Oro complained that Finley, his dental assistant, spent too much time on personal telephone calls. Dr. Greenspan spoke to her and she was transferred to Dr. Peterson. Additionally, in February 1992 one of the dentists at the facility complained that dental assistant Brenda Bright was not attentive, and Dr. Greenspan transferred her to another dentist.

Dr. Greenspan testified that on a number of occasions, he has hired a dental assistant on the recommendation of a dentist. The one situation that he testified about involved Dr. Lea Bram, a dentist whom he hired in February 1995. Dr. Bram told him that she needed a dental assistant and recommended Jacqueline Wright, the assistant with whom she worked at her previous place of employment. Dr. Bram arranged for Wright to call Dr. Greenspan, and he told her that he had an opening for a dental assistant and asked if she would like to come to the facility for an interview. When he interviewed her, he did not question her about her skills, because Dr. Bram had spoken so highly about her, and only spoke to her about salary, the working conditions, and the Local 153 contract. In hiring her, he "relied on her recommendation exclusively."

B. *The Alleged Threat to Close*

The 10(j) hearing before Judge McKenna took place on Friday, March 17, 1995. Admittedly, on about March 14, 1995, Dr. Greenspan had conversations with some of the dentist at the facility about the affect that the injunction would have on the continued viability of the facility. What distinguishes this case from the normal threat to close under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is that in the instant case the statement that was made allegedly involved threats of action not by Dr. Greenspan, but by Vito Pitta, a trustee of the Dental Plan.

Dr. Mello testified that on about March 14, 1995, she and another dentist were at the facility talking about the injunction hearing: "We didn't know what it meant." Dr. Greenspan overhead the discussion and invited them into his office to talk about it. He told them that if the injunction was granted he would have to recognize the Union, at least temporarily. They asked what it meant as far as their jobs were concerned:

> And he said that he didn't know. He said that he wasn't aware of what was going to happen to this clinic. He wasn't aware of what was going to happen to his job or our jobs. And he said he...had the union for a long time...he's been dealing with the union for a long time. And there never really was a problem. It just seems now there was. And it wasn't with him. He said it was maybe the man who hired him, Mr. Pitta. So, he didn't know which way it was going to go.

Regarding whether the injunction proceeding could have something to do with closing the facility, she testified: "He said he didn't know if it would. He said that Mr. Pitta was unhappy with our union, not a union per se, but our union. But he didn't know what he was going to do with that." The other doctor asked about other job possibilities for the dentists, but Dr. Greenspan did not have much to say on that subject.

Dr. Kozic testified that on March 14, 1995, everybody in the office was discussing the upcoming injunction hearing. Drs. Mello and Oro said that Dr. Greenspan said that Pitta would close the facility if the Union won the case. Dr. Kozic approached Dr. Greenspan and said, " I heard Vito's closing the office if Doctors Council wins the case." Dr. Greenspan said that he thought that he would lose the case and "that Vito was not going to deal with Doctors Council in any way, shape or form." He also said that the New York City Hotel and Motel Trades Council and Hotel Association of New York City, Inc. Welfare Fund (the Welfare Fund), had built a large medical and dental office in Queens, New York, and "at this point, Vito doesn't need us anymore, and he could very easily close the office." On cross-examination he testified that Dr. Greenspan said that Pitta would close the facility because he would not deal with the Union. Dr. Kozic then said that Respondent had a contract with the Dental Fund, and Dr. Greenspan responded that the contract was cancelable at any time at the discretion of Pitta or the Dental Fund. Dr. Greenspan said that he was concerned that the facility was going to close, and that "the issue was more between Doctors Council and Vito, and not between the dentists and his recognition of the union itself, that he always got along. He always had a good working relationship with the union. And until Vito got upset with the Doctors Council, everything was fine."

Dr. Greenspan testified that a few days prior to March 14, 1995, he overheard a loud discussion at the facility among the dentists about the 10(j) proceeding. Because he felt that it was not appropriate that such a conversation take place in the vicinity of patients and other employees, he asks Drs. Mello and Oro to come to his office. He testified (through hearsay testimony not accepted for the truth of the matter) that a Dr. Mitchell, a dentist at the facility who was on maternity leave, had previously told him that she and Dr. Mello (who did not testify about such a conversation with Pitta) had met with Pitta. When the three were present in his office, Dr. Mello asked him what the 10(j) proceeding meant to them. He told them that he had a contract to provide dental services and

intended to keep it. "What my client's position was going to be, with regard to it, I didn't know." Mello said that she had met with Pitta and that he made it clear that he did not want to deal with the Union. He testified further that on March 14, 1995, Dr. Kozic asked him, "What's going on with this 10(j) business?" He told him what he had told Dr. Mello and Oro a few days earlier; he did not tell him that he would close the office. He also told him that Pitta had the right to terminate the contract. Dr. Greenspan also testified that he had no conversation with Pitta or any other representative of the Dental Fund about the impact that a 10(j) injunction would have with his contract with the Dental Fund: "My only knowledge of the subject came from the two doctors that went to see him. And they reported to me on what Mr. Pitta told them." The agreement between Respondent and the Dental Fund is effective through December 31, 1995. It is provides that either party can terminate the agreement on 90-day notice to the other, or can cancel on 30-day written notice for "material breach" of the agreement. Finally, there was some brief testimony by Drs. Kozic and Greenspan that offices that had been operated by Dr. Greenspan in Brooklyn and on 47th Street in New York City were closed and taken over by either the Dental Fund or the Welfare Fund.

C. *Analysis of 8(a)(5) Allegations*

There are three separate, yet related, allegations involved herein. It is alleged that Respondent withdrew recognition from the Union by letter dated August 22, and since that time has failed and refused to recognize, or bargain with, the Union as the exclusive representative of its dentists, that subsequent to August 22, Respondent bypassed the Union and dealt directly with these employees concerning their terms and conditions of employment, and that on about September 6, Respondent unilaterally granted wage increases of $32 a day ($16 to Kozic) to each of its dentists in the unit, without prior discussion with the Union. Respondent admits that it engaged in these actions, but denies that they constitute unfair labor

practices under the Act because all the unit employees, herein constitute supervisors within the meaning of the Act.[5] In fact Respondent's August 22 letter to the Union specifically states that Respondent was refusing to bargain with the Union because the dentists it employs are supervisors within the meaning of the Act, especially in light of the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994). The issue therefore is simply whether the dentists employed at the facility are supervisors within the meaning of Section 2(11) of the Act.

The *Health Care* case did not change the overall law regarding 2(11) supervisors. Rather, as stated by Judge McKenna in his memorandum and order, the Court rejected the Board's interpretation of the phrase "in the interest of the employer," because patient care was the business of the employer in that matter, "and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer." The Court made it clear that it was not changing any other part of the law regarding Section 2(11) of the Act and impliedly was critical of what it considered to be the Board's rigidity in insisting on the "in the interest of the employer" test saying: "If the case presented the question whether these nurses were supervisors under the proper test, we would have given a lengthy exposition and analysis of the facts in the record." I will therefore determine whether Respondent's dentists are supervisors within the meaning of Section 2(11) under the "traditional" criteria.

The Board has been instructed that in interpreting Section 2(11), it must not "construe supervisory status too broadly, for a worker who is deemed a supervisor loses his organizational

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[5] Respondent denied the allegation contained in par. 10(b) of the consolidated complaint that alleges that the wage increase granted on September 6 relates to wages, hours, and other terms and conditions of employment of the unit, and is a mandatory subject of bargaining. It requires no case citations to conclude that wage increases are mandatory bargaining subjects, and I so find.

rights." *Westinghouse Electric Corp. v. NLRB,* 424 F.2d 1151, 1158 (7th Cir. 1970); *McDonnell Douglas Corp. v. NLRB,* 655 F. 2d 932, 936 (9th Cir. 1981.). Additionally, it is the party alleging supervisory status, the Respondent herein, that bears the burden of proving that such status exists. *Thayer Dairy Co.,* 233 NLRB 1383 (1977): *Tucson Gas & Electric Co.,* 241 NLRB 181 (1979); *Health Care & Retirement Corp.,* 306 NLRB 63 (1992). The evidence that Respondent has attempted to produce falls into two categories. That these dentist responsibly direct the dental assistants and that they have the authority to effectively recommend the hire, transfer, suspension, assignment, or discipline of the dental assistants. The direction of the dental assistants will be discussed first.

Although there are no major credibility determinations, I found Dr. Kozic the least credible and convincing of the witnesses at the hearing; he clearly had difficulty admitting to anything that he felt might assist Respondent's case. On the other hand, I found Dr. Greenspan, as well as Drs. Mello and Oro, to be credible and believable witnesses who appeared to be testifying in an honest and open manner. The evidence establishes that the dentists have the authority to "release" their dental assistants to make or receive telephone calls, to have a cup of coffee, or to attend to brief personal business, and do so when they are performing a procedure in which the dental assistant is not needed. In addition, the dentists ask (but cannot require) the dental assistants to work overtime with them, and ask the dental assistant to assist them in procedures in the absence of their regular assistant. Such activities clearly are not enough to constitute supervisory status. Section 2(11) requires that the direction of work be done "responsibly," and not be "of a merely routine or clerical nature, but requires the use of independent judgment.' Telling an assistant that she can go for a cup of coffee is a routine assignment not requiring the use of independent judgment. As the court stated in *NLRB v. Security Guard Service,* 384 F.2d 143, 147 (5th Cir. 1967): "Moreover, the statutory words 'responsibility to direct' are not weak or jejune but import active vigor and potential vitality."

More seriously, the evidence establishes that the dentists effectively recommend the transfer of dental assistants, in two situations recommended the termination or suspension of employees, and on one occasion effectively recommended the employment of an individual. Taking these in inverse order, Dr. Greenspan credibly testified that he relied on Dr. Brams recommendation in hiring Wright. He did not question Wright about her skills in the interview, because Dr. Bram had spoken so highly about her. Dr. Greenspan also testified that in deciding to first suspend and then terminate Ladson, his reliance on Dr. Wexley's "input was total." Because he did not work directly with Ladson, "I rely solely on what the doctor says about the assistants with regard to what action to take." Williams suspension letter states that Drs. Mello and Greenspan had spoken to her about her poor performance. Most clearly, however, it appears that the dentists effectively recommend the transfer of dental assistants. About a half hour after Dr. Mello told Dr. Greenspan that she could no longer work with Williams because she was not helping her, Williams was transferred to another job as none of the dentists wanted to work with her. After Dr. Oro told Dr. Greenspan that he did not want to work with Finley anymore, Dr. Greenspan immediately transferred her to another dentist. Dr. Greenspan testified that he transferred Brown to another dentist at the request of Dr. Peterson and transferred Bright after the dentist with whom she worked complained that she was not being attentive. Countering this testimony is the testimony of Kozic that Vetrone and Branch were transferred without any request on his part. He complained to Dr. Greenspan about both of them spending an excess amount of time on the phone, but did not request that they be transferred. In fact, after Vetrone was transferred, he wrote to Dr. Greenspan complaining about the transfer.

The credible evidence therefore establishes that on one occasion a dentist effectively recommend that a dental assistant be hired and that on three occasions dentists effectively recommended that the dental assistants then working with them be transferred to another dentist. I find less reliable and not as convincing Dr. Greenspan's testimony about Ladson.

Contrary to this testimony is Dr. Kozic's credible testimony that Vetrone and Branch were transferred from him without his knowledge and, with Vetrone, over his written objections.

It has often been said that it is "not the exercise of authority, but the delegation of authority which is indicative of the attributes of a supervisor." *NLRB v. Southern Seating Co.,* 468 F.2d 1345, 1347 (4th Cir. 1972); *NLRB v. Pilot Freight Carriers,* 558 F.2d 205 (4th Cir. 1977). In situations such as the instant matter, however, when the dentists were never specifically notified, orally or in writing, that they had such authority, the frequency of execution of the authority is relevant to a determination of whether they had the requisite authority and, therefore, their supervisory authority. In *NLRB v. Lindsay Newspapers,* 315 F.2d 709, 712 (5th Cir. 1963), the court stated that "sporadic exercise of some supervisory authority does not of itself turn an employee into a supervisor." In *McDonnell Douglas,* supra at 937, the court stated: "Such an infrequent exercise of supervisory authority may reasonably be viewed as insufficient to render Section 2(11) applicable." In *Artcraft Displays,* 262 NLRB 1233 fn. 7 (1982), the Board commented on a leadman's testimony that he had laid off employees out of seniority: " Even if leadmen do possess this authority, it is so restricted and exercised so sporadically that it is not an indicium of supervisory status." In *NLRB v. Orr Iron, Inc.,* 508 F.2d 1305, 1307 (7th Cir. 1975), on one occasion the alleged supervisor told an employee to do his work or to go home, and on another occasion, he sent an employee to the superintendent and told him of the employee's poor attendance. The court stated:

> But these were incidental and extraordinary exception to Collins' regular practice, and when looked at against a total background do not in any way show that Collins had the authority to discipline or recommend the discipline of employees as one of his regular functions.

See also *Highland Superstores v. NLRB,* 927 F.2d 918 (6th Cir. 1991). The words of the court in *Orr Iron*, supra, apply to

the instant matter as well. The work of the employees herein is to perform dental work on Respondent's patients for about 7 hours a day. If once a year they ask Dr. Greenspan to transfer their dental assistant to another dentist, and he follows that recommendation, these activities are "incidental and extraordinary exceptions" to their dental practice and does not, without more, make them supervisors within the meaning of the Act.

There is an additional reason why I find that they are not supervisors under the Act. A number of Board cases have found that when two people work together closely, what might otherwise be considered an indicia of supervisory authority (the power to hire, fire, transfer, or effectively to recommend such) is really a means of ensuring compatibility of the employees. *Willis Shaw Frozen Food Express*, 173 NLRB 487 (1968), involved a driver and assistant driver who worked long hauls together. The driver had the authority to choose the assistant he wants to work with and, if he feels that the assistant is incompatible, the assistant is transferred to another driver. The Board found that the driver was an non-supervisory employee: " We are persuaded that the role they play in such matters is, under the Employer's policy, principally in their own interest to ensure a harmonious relationship between themselves and their assistants." See also *Kenosha News Publishing Corp.*, 264 NLRB 270 (1932). In *Lipsey, Inc.*, 172 NLRB 1535 at fn.2 (1968), the Board stated:

> ...it has been the practice of Respondent, whenever possible, to grant the request by a welder for a particular helper, and to honor a welder's request that a specific individual be hired for such assignment. To the extent that this arrangement may be viewed as bestowing on welders authority to effectively recommend personnel action, it is basically a limited and personal authority exercised not "in the interest of the employer" but, as the Trial Examiner found, in their own interest to suit their own particular needs and desires.

In *Soil Engineering Co.*, 269 NLRB 55 (1984), The Board, in finding that the employees were not supervisors within the meaning of the Act, quoted from *Southern Bleachery & Print Work*, 115 NLRB 787, 791 (1956):

> We have no doubt that almost any employer, when told by a skilled craftsman that his helper is incompetent and that he needs a new helper if he is properly to perform his functions, would accept the judgment of the craftsman. While this may be called effective recommendation, it is inherent in the craftsman-helper relationship....

Likewise, it is also inherent in the dentist-dental assistant relationship. For "four handed sit-down dentistry" to operate properly, the dentist must get along with, and have confidence in, the dental assistant that he/she is working with. Dr. Greenspan is correct that when a dentist asks him to make a change in his/her dental assistant he follows that recommendation because it is the dentist, not him, who worked with the dental assistant. But that alone should not, and does not, convert a dentist-unit employee into a supervisor within the meaning of the Act. It only means that the dentist wants to work with a dental assistant with whom he can work efficiently, and his employer agrees with that conclusion.

Finally, although the Supreme Court rejected one of the Board's criteria for supervisory status for nurses in the *Health Care* case, above, it approved another:

> To be sure, in applying Section 2(11) in other industries, the Board on occasion reaches results reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives. It is important to emphasize, however, that in almost all of those cases (unlike in cases involving nurses) the Board's decisions did not result from manipulation of the statutory phrase "in the interest of the employer," but instead from a finding that the employee in question had not met the other requirements for

> supervisory status under the Act, such as the requirement that the employee exercise one of the listed activities in a non-routine manner.

Similarly, the Board in *Golden West Broadcasters,* 215 NLRB 760 fn.4 (1974), stated: "an employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor." And in *The Door*, 297 NLRB 601 fn. 7 (1990): "In other contexts we have also found that the routine direction of employees based on a higher level of skill or experience is not evidence of supervisory status." Most professional employees employed in a commercial setting have some authority over their subordinates pursuant to their training and positions. A finding that the dentists herein are supervisors within the meaning of the Act would severely limit the applicability of Section 2(12) of the Act.

For all of the above reasons, I find that the dentists employed at the facility are not supervisors within the meaning of Section 2(11) of the Act. I therefore find that since August 22, Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, and by refusing to recognize and bargain with the Union, as the exclusive bargaining representative of its dentists. I also find that since August 22, Respondent violated Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with its dentists concerning wages and other terms and conditions of employment, and by unilaterally granting wage increases to its dentists on about September 6.

D. *Analysis of 8(a)(I) Allegation*

Admittedly, on March 14, Dr. Greenspan had conversations with several employees when he told them of the possibility that the facility would close if the Board were successful in the 10(j) proceeding before the court on March 17. What makes this unusual is that Dr. Greenspan's "threats" were that another (Pitta) would (or might) cancel the agreement with him if the injunction was granted. As stated supra, I found

Drs. Mello and Greenspan more credible than Dr. Kozic and, when there is a conflict, I would credit their testimony over his. Dr. Mello, who obviously was an impartial witness, testified that on March 14, Dr. Greenspan overheard her and another dentist discussing the upcoming court hearing and called them into his office. When they asked him how it would affect their jobs, he said that he didn't know what was going to happen to the facility or their jobs and that he had no problem with the Union, he had been dealing with it for a long time. Regarding whether the court hearing could result in closing the facility, he told them that he did not know. "He said that Mr. Pitta was unhappy with our union....But he didn't know what he was going to do." Dr. Greenspan testified that, in this conversation, the dentists told him of statements that Pitta had allegedly made, and they asked him what effect the injunction hearing would have on them. He told them that he did not know what Pitta would do. When Dr. Kozic spoke to him about the situation on March 14, 1995, he told him what he had told Dr. Mello and that Pitta had the right to terminate his contract. He also testified that he never spoke to Pitta or anybody from the Dental Fund about the court hearing.

In *Gissel,* 395 U.S. at 618, the Court stated:

> He may even make a prediction as to the precise effect he believes unionization will have on his company. In such case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there I any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and

as such without the protection of the first amendment.

The credited testimony establishes that when Dr. Greenspan overheard some of the dentists discussing the situation at the facility, he called Dr. Mello and another dentist into his office and told them that he did not know what would happen with the facility, that he had no problem with the Union, the problem was with Pitta, who was unhappy with the Union. I find that Dr. Greenspan did not cross the line into impermissible threats under *Gissel.* He did not initiate these conversations; rather, he brought them into his office rather than a more public area of the facility. When Mello spoke about her conversation with Pitta, which was not accepted for the truth of what was said, he told them that he did not know what Pitta would do. He never said that Pitta would not deal with him if the injunction was granted and never said that he would close the facility if the injunction was granted or that he would do anything as a result of the Court hearing. In fact, he told them that he had no problem with the Union. He basically said that he didn't know what would happen, that it was up to Pitta. These statements were carefully phrased statements that were based upon facts beyond his control. I therefor find that these are lawfully permissible statements and recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time dentists employed by the Respondent at its facility, but excluding all other employees, clerical employees, guards, and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) and (5) of the Act by engaging in the following activities:

(a) Withdrawing recognition from the Union as the exclusive bargaining representative of its dentists on August 22, 1994.

(b) Failing and refusing to recognize or bargain with the Union as the representative of these employees since that time.

(c) Bypassing the Union and dealing directly with the employees since that time.

(d) Unilaterally granting wage increases to its employees on about September 6, 1994, without prior discussions with the Union.

5. Respondent did not further violate the Act as alleged in the consolidated complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Principally, I shall recommend that Respondent be order to recognize and, on request, bargain with the Union over the terms and conditions of employment of the dentists at the facility and, on the request of the Union, to rescind the unilateral wage increases that it granted to its dentists on about September 6, 1994. Nothing herein, however, shall be construed as requiring Respondent to revoke the wage increases granted to the employees, absent the written consent of the Union.

On these findings of fact and conclusions of the law and on the entire record, I issue the following recommended [6]

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Robert Greenspan, DDS, P.C., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time dentists employed by the Respondent at its facility at One Penn Plaza, New York, New York, but excluding all other employees, clerical employees, guards, and supervisors as defined in the Act.

(b) Failing and refusing to bargain with the Union as the exclusive bargaining representatives of its employees in the above-described unit.

(c) Bypassing the Union and dealing directly with its employees concerning their terms and conditions employment.

(d) Unilaterally changing the wages or other terms and conditions of employment of these employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union, in writing, that it recognizes the Union as the exclusive bargaining representative of the employees in the above-described unit and that, on request, it will bargain with the Union over the terms and conditions of employment of these employees.

(b) Upon the request of the Union, rescind the unilateral wage increases that it granted to its dentists on about September 6, 1994.

(c) Post at its facility copies of the attached notice marked "Appendix" [7] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint herein be dismissed insofar as it alleges violations not specifically found.

Dated, Washington, D.C. May 22, 1995.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from Doctors Council (the Union), or any other labor organization, absent a good-faith doubt of the Union's majority status based on objective considerations.

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[7] If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT deal directly with our employees who are represented by the Union regarding their terms and conditions of employment, and WE WILL NOT unilaterally change their terms and conditions of employment without prior negotiations with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL forthwith notify the Union, in writing, that we recognize it as the exclusive bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time dentists employed at our facility located at One Penn Plaza, New York, New York, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

WE WILL, on request, bargain with the Union about the terms and conditions of employment of these employees and, if agreement is reached, put said agreement in writing.

WE WILL, on request, rescind the unilateral wage increase we granted to these employees on about September 6, 1994.

ROBERT GREENSPAN, D.D.S., P.C.

JD(NY)-48-95
New York, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ROBERT GREENSPAN, D.D.S., P.C.

and

DOCTORS COUNCIL

Case No. 2-CA-27907
2-CA-28304

Burt Pearlstone, Esq., Counsel for the General Counsel.
Richard M. Betheil, Esq., Pryor, Cashman, Sherman & Flynn, Counsel for Charging Party.
Ira Drogin, Esq. and Laurent Drogin, Counsel for Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me in New York, New York on April 20 and 21, 1995. The Consolidated Complaint herein, which issued on March 31, 1995 was based upon unfair labor practice charges filed by Doctors Council, herein called the Union, on October 24, 1994[1] and March 28, 1995. The Complaint alleges that on about August 24, Robert Greenspan, D.D.S., P.C., herein called Respondent, withdrew recognition from the Union as the exclusive bargaining representative of the dentists that it employs, and since that time has failed to recognize and bargain with the Union. The Complaint further alleges that subsequent to August 22, Respondent bypassed the Union and dealt directly with its employees concerning wages and other

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1994.

terms and conditions of employment, and on about September 6, Respondent unilaterally instituted wage increases of $32 a day for its unit employees. Finally, the Complaint alleges that on about March 14, 1995, Respondent, by Robert Greenspan, D.D.S., its owner, agent and supervisor within the meaning of the Act, informed its employees that its facility would be forced to close if the Union prevailed in its charges filed with the Board. By Order dated March 21, 1995, Lawrence M. McKenna, District Judge for the United States District Court for the Southern District of New York, granted the Board injunctive relief pursuant to Section 10(j) enjoining Respondent from engaging in the actions alleged[2] , except for the alleged threat to close. The charge alleging that violation was filed after the Judge's Order issued.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that it has been an employer in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2 (5) of the Act.

III. The Facts

Prior to August 22, the Union had been the recognized collective bargaining representative of the dentists employed by Respondent for over ten years. The last collective

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[2] Judge McKenna, in his Memorandum and Order, stated that the injunctive provisions shall have no further force and effect after June 30, 1995 unless the Administrative Law Judge shall have rendered a Decision on this matter on or before that date, and that, should there be an appeal from that Decision, then the injunctive provisions would have no further force or effect after September 8, 1995, unless the NLRB shall have rendered a decision on the appeal by September 8, 1995.

bargaining agreement between the parties expired on December 31, 1993. Negotiations for a new collective bargaining agreement had commenced when Counsel for Respondent wrote to the Union by letter dated August 22:

> In view of the decision of the United States Supreme Court on May 23, 1994 in *National Labor Relations Board v. Health Care and Retirement Corporation of America* [114 S. Ct. 1778 (1994)], my client will not engage in collective bargaining negotiations with your Union concerning the dentists he employs, for the reason that those dentists are supervisors within the meaning of Section 2 (11) . . . of the National Labor Relations Act.

Since that time, Respondent has refused to recognize or bargain with the Union as the collective bargaining representative of its dentists, claiming, as stated in the August 22 letter, that they are supervisors as defined by the Act. In fact, Respondent admits that, subsequent to August 22, it bypassed the Union and dealt directly with its dentists concerning wages and other terms and conditions of employment, and that on about September 6, it unilaterally instituted wage increases of $32 (with the exception of one employee who received $16) a day to its dentists.

The dental clinic in question is located at One Penn Plaza in the City and State of New York, herein called the facility. Respondent has provided dental services to the members of, or participants in, New York Hotel and Motel Trades Council and Hotel Association of New York City, Inc. Dental Fund, herein called the Dental Fund, for a number of years pursuant to agreements with the Dental Fund. The last such agreement, herein called the Agreement, was executed by Respondent on May 27 and was effective for the period December 1, 1993 until December 31, 1995. The patients cared for pursuant to this Agreement represent 100% of Respondent's business. In addition to the ten dentists employed by Respondent at the facility, there are three dental specialists (not in the unit), five clerical receptionists, a sterilization assistant, an x-ray

assistant, three hygienists and about fifteen dental assistants.[3] In addition to Dr. Greenspan, Dr. Findberg, the chief of staff and Mila Gutterman, the office manager, are present at the facility. It is the dentists' working relationship with the dental assistants that was the principal subject of this hearing.

Dentists and Dental Assistants

The dentists at the facility perform normal dental care. Dr. Michael Kozic testified: "I treat patients in general routine dentistry. I do cavities, fillings, root canals, extractions, make bridges and crowns. General dentistry." The dental assistant is the other part of the "four handed sit-down dentistry." There is no conflict between the testimony of Drs. Kozic and Greenspan regarding the dental assistants' duties; as Greenspan's testimony is more complete, it follows:

> She has the functions that start before the patient is in the operatory. She has functions that take place while the patient is in the operatory. And she has functions after the patient leaves the operatory.
>
> Before the patient arrives, she has duties, as far as putting appropriate guards, getting instruments, sterilize hand pieces, things of that nature that she does independently of the doctor.
>
> Then she goes out and brings the patient in from the waiting room to the operatory. She seats the patient, places a bib on them.
>
> From that point forward, her functions with the doctor are, as . . . as a second set of hands. She'll retract tissue, she'll mix materials, she'll aspirate

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[3] Respondent's office clerical employees, dental hygienists, x-ray technicians and dental assistants have been represented by Local 153, Office and Professional Employees International Union, AFL-CIO, herein called Local 153, since about 1989. The most recent collective bargaining agreement covering this unit is effective from June 1, 1994 through May 31, 1996.

> fluids . . . when she's not present, its very difficult to . . . perform procedures. She's essentially part of a team that works on the patient.
>
> When the doctor is finished with those procedures, the patient will be brought to the waiting room . . . and she will have functions with regard to cleaning up the operatories-bringing the non-sterile instruments to central sterilization . . . and preparing the operatory for the next patient.

When the dental assistants are not working directly with a dentist, they are doing what Dr. Kozic referred to as "miscellaneous duties", such as cleaning out the suction machines and the labs and breaking down empty cartons. In addition, one dental assistant performs the sterilization work at the facility. Gutterman makes the assignments of the dental assistants to these miscellaneous duties, as well as assigning dental assistants to particular dentists. In fact, the evidence establishes that once a dental assistant is assigned to work for a particular dentist, that is considered to be a permanent assignment absent any disagreements that cause one or the other to ask for, or demand, a reassignment. There is a large discrepancy in the longevity of the partnerships of dental assistants to dentists. Kozic, who has been employed by Respondent for fifteen years, testified that during this period he has worked with about 50 dental assistants. Although the evidence establishes that he is difficult to get along with, certainly most of these assistants were meant to be temporary, such as when his regular assistant was absent. On the other hand, Dr. Elisa Mello, who has been employed by Respondent for almost two years, has had four dental assistants assisting her. Both Drs. Kozic and Mello testified that Gutterman, and her predecessor, Meri Pifko, assigned the dental assistants to them without any input from the dentists.

Dental assistants make arrangements for vacations, personal days and sick days with the office manager; the dentists have no input in these issues. The parties stipulated that Respondent's vacation request form has a signature line stating

"Personnel Department" containing the signatures of Pifko, Gutterman, Greenspan, or no signature. Dr. Kozic testified that he works overtime during his regular lunch hour from 12:30 to 1:30 a couple of times a week, seeing patients. He asks his dental assistant if she would also work on those occasions: "If she wants to work lunch, she can work lunch. If she doesn't want to work lunch, I can't make her work lunch." On most of the occasions, his dental assistant has worked overtime pursuant to his request, and was paid for the overtime work. Respondent's contract with Local 153 provides that the dental assistants and others in the unit shall work seven hour days and thirty five hour weeks, and that all work in excess of that is to be paid at time and a half. The contract further provides: "All employees shall work a reasonable amount of overtime each week if required by the Employer."

As stated above, there is a dental assistant assigned to each dentist at the facility. The evidence establishes that during most of the procedures performed by the dentists at the facility, the assistance of the dental assistant is needed. There are time, however, when the dentist is performing a procedure where the services of the dental assistant are not needed. Dr. Kozic testified that on these occasions his dental assistants usually perform other tasks on their own. If they do not, he suggests other work for them to perform: "If you want to supply the room now, supply the room." In these situations, he has released the dental assistant to answer or make a telephone call, and he has observed other dentists doing that as well. He has also observed other dentists releasing dental assistants to get a cup of coffee. He has not done so: "She's not chained to the chair. I'm not releasing anybody." Dr. Greenspan testified that if the dentist is performing an operation that does not require the services of the dental assistant, the dentist has the authority to give the dental assistant time off until she is needed again, and this occurs regularly at the facility. If a dental assistant is paged for a telephone call, his experience is that the dental assistant usually asks the dentist if she can take the call. If the dentist is performing a procedure where the dental assistant is not needed, she may take the

call without first asking. Dr. Mello testified that when she is performing a procedure where she does not need the dental assistant, she has the authority to release the assistant to have a cup of coffee. She also has the authority to tell the dental assistant whether she can leave the operatory to answer, or make, a telephone call. If the dental assistant tells her that she wants to make a telephone call at a time when she was assisting in a procedure or is about to bring in a patient, Dr. Mello would ask her to "explain to me what the necessity of the call is. And if I deem it important, I'll say, okay, go ahead." Dr. Jaim Oro, who has been employed by Respondent as a dentist for four years, testified that when he is performing a procedure that does not require the services of his dental assistant, he usually asks the assistant to perform some other task such as getting his files for his work on the following day. He also has the authority to release the dental assistant to have a cup of coffee, and has done so. He also has the authority to tell the assistant whether she may make or receive a telephone call, and has exercised this authority as well.

Because dental assistants are assigned to work with a particular dentist, situations occur fairly regularly where a dental assistant is absent for a day and the dentist has to obtain a replacement to cover for the absent dental assistant. Dr. Kozic testified that when his dental assistant was absent for a day, he had three options: almost half of the time he would ask Gutterman (or her predecessor, Pifko) to assign another dental assistant to him. His second option, also less than half of the time, was to only perform procedures that he could do by himself. His final option, about 10% of the time, was to attempt to borrow a dental assistant to help him. On those occasions, when he sees that the dentist and the dental assistant are in the operatory with no patient in the chair, he asks the dental assistant (rather than the dentist) if she would help him with his patient. If the dental assistant refuses, he asks Gutterman to assign a dental assistant to work with him. Dr. Greenspan testified that on some mornings when he arrives at the facility there is a message that a certain dental assistant will not be in to work that day. If a dentist is also absent that day, he or Gutterman assigns the two partnerless individuals

to work with each other that day. When there are more dentists then dental assistant at work, the dentists will usually work it out amongst themselves. The dentist whose dental assistant is absent goes to the staff lounge, and if any dental assistant is there taking a break or having coffee, the dentist will ask the dental assistant to help him with a procedure. If no dental assistant is obviously available, or refuses the dentist's request, the dentist then asks one of the other dentist whom he sees is performing a procedure that does not require the dental assistant to borrow his dental assistant, and the dentists have the authority to release their dental assistant to assist another dentist. Dr. Mello testified that there have been occasions when other dentists at the facility did not have a dental assistant and needed one for a procedure where a dental assistant was critical, and have asked her if they could use her assistant. If she did not need her assistant at that time, she told her to help the dentist, "because I don't really need you right now and they do." She has done this without first telling Dr. Greenspan or Gutterman. In addition, a couple of times a month, she has asked another dentist at the facility to borrow his dental assistant. She testified that in her two years of employment prior to August, her dental assistants were absent from work on about seven occasions, but they were also absent for portions of a day that required her to obtain a replacement. The first thing that she does when she learns in the morning that her dental assistant would not be at work is to ask Gutterman if a dental assistant is available to work with her for the day. On some of those occasions Gutterman assigned another dental assistant to work for her for the day. On other occasions, Gutterman told her to see if she could find a dental assistant to assist her.

It is clear that the dentists at the facility do not have the authority to hire or fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees on their own. In addition, they have no access to employee files at the facility and have no authority to issue written warnings to employees. There is an issue, however, of whether they have the authority to effectively recommend the discipline or transfer of employees.

Dr. Kovic testified that he was never told that he had the authority to recommend the promotion, discharge, transfer or lay off of an employee at the facility. Dr. Greenspan testified about Ruth Ladson, a dental assistant who was suspended in February 1991 and terminated in September 1991. Ladson's file contains a letter dated February 21, 1991 from Dr. Greenspan notifying her of her suspension and final warning. The letter states that on three occasions over the prior two weeks, Pifko and Dr. Wexley spoke to her about her inadequate job performance, but that it had not improved. In fact, two days earlier, she had failed to conform to the proper infection control procedures. When asked what input Dr. Wexley had in Ladson's termination, Dr. Greenspan testified:

> Dr. Wexley's input was total. I don't work with each assistant. We don't have a regular program with me supervising them or--or looking at their skills. I rely solely on what the doctors say about the assistants with regard to what action to take, with regard to their performance. If Dr. Wexley hadn't brought this to my attention, I probably would still not know about it.

Dr. Greenspan also testified about Marcia Williams, a dental assistant, who was suspended on January 13, 1993. The letter notifying her of the suspension states that he and Dr. Mello have previously spoken to her about her "unprofessional and lackadaisical performance". Subsequent to this suspension, Dr. Mello told Dr. Greenspan that she didn't want to work with Williams. His normal practice is to grant such requests, but none of the dentists wanted to work with Williams, so she was transferred to another job at the facility and was terminated three months later.

Gail Vetrone (formerly Gail Rahaley) testified that she has been employed as a dental assistant at the facility for two years. During 1993 she was the dental assistant for Dr. Kozic in 1993. In November 1993 she filed a grievance with Local 153 alleging that Kozic "is impossible to work for." She stated in the grievance, and testified, that he used to threaten

her by saying that if she doesn't work for him, she is out of the door, or doesn't work at all. She requested a transfer to a different dentist and was subsequently transferred to work for another dentist at the facility. Dr. Kozic testified that he told Vetrone that if she continued to speak on the phone, he would do something about it; he believed that he had the authority to warn her because: "she interrupted patient care." The day after Vetrone was transferred to a different dentist, Dr. Kozic wrote a letter to Dr. Greenspan objecting to the transfer. He testified that, aside from spending too much time on the telephone, she was a good dental assistant.

The most frequent form of "discipline" at the facility appears to be the transfer of dental assistants from one dentist to another or from one dentist to another position at the facility. Dr. Mello testified about her relationship with Marcia Williams who was terminated in 1993 as described above. She testified that Williams was her dental assistant; however, she did not pay attention to what Dr. Mello was doing and was not properly assisting her. She spoke to Williams about it on three occasions, telling her that she had to pay attention to her work and not talk to other people or look at a book during the procedures. Although she had not been specifically told that she could give her such a warning, she felt that she had this authority: "We have working relationship. She is supposed to be assisting me. She wasn't doing it." The next time that Williams did not pay attention to her work, Dr. Mello spoke to Dr. Greenspan about her problems with Williams: "I can no longer work with her. She is not helping me." About a half hour later, she was transferred and assigned to a sterilization job at the facility. Dr. Oro testified about a situation with Symenthia Finley, who had been employed at the facility as his dental assistant. she was not performing her job properly in that she was not getting the patients from the waiting room, properly sterilizing the room or giving him the instruments. He spoke to her and told her that unless her work improved, he would discuss it with Dr. Greenspan. Her work improved for a brief period, and then "she went back to her old ways." Dr. Oro then discussed Finley's performance with Dr.

Greenspan and Finley's performance again improved for a brief period. About a month or two later, when Finley's performance again deteriorated, Dr. Oro went to Dr. Greenspan, said that he did not want to work with Finley anymore, and asked for a different dental assistant. Dr. Greenspan said that he would do something about it and he immediately made that change.

There was testimony about Troy Branch, a dental assistant who worked with Dr. Kozic at the facility in about 1992. Dr. Kozic testified that Branch was always on the telephone, either making or receiving calls. He kept track of Branch's calls noting that in a one hour period he had four telephone calls. He spoke to Branch about the telephone calls and may have threatened that he would have him fired. He testified that while he may have made this threat, he did not believe that he had the authority to effectively recommend that employees be disciplined. He may have said it because he was upset that nothing had been done about Branch's telephone calls. When the situation did not improve, he then wrote a letter to Dr. Greenspan stating that he was upset that Branch spent too much time on the phone and that it disrupted his patient care. He asked Dr. Greenspan to tell Branch to stay off the phone. Shortly thereafter, Drs. Greenspan and Kozic met with Branch and Dr. Greenspan told him to stay off the phone. Branch continued to spend a lot of time on the phone, and a few months later, when Dr. Kozic reported for work, he learned that Branch was transferred to a different dentist. Dr. Greenspan testified that Dr. Kozic complained to him about Branch spending too much time on the telephone, and asked him to talk to Branch about his telephone calls, which he did. Dr. Kozic did not ask him to discipline Branch. Shortly thereafter, Dr. Kozic told him that the problem with Branch was continuing, and showed him a log of Branch's telephone calls. Dr. Greenspan said that he would speak to Branch again, which he did. Subsequently, Branch filed a grievance with Local 153 alleging that Dr. Kozic was harassing him, and he

transferred Branch because it was obvious that he and Dr. Kozic could not work together.[4]

Dr. Kozic testified further that on another occasion, when Vetrone was his dental assistant, at a time that he was prepared to begin a procedure she received a telephone call and remained on the phone for ten minutes. When he could not get her to get off the phone, he told Gutterman of the situation and she sent another dental assistant to work with him on the procedure. Sometime thereafter (as discussed more fully above) Vetrone was transferred to work with another dentist. Dr. Kozic testified that this transfer was made without his prior knowledge. He testified further that, within the last year, while he and his dental assistant were working, Finley came into the operatory and began talking to his assistant. He asked Finley to leave and she told him that he could not tell her what to do. When he again asked her to leave she commented in an obscene way that he could not tell her what to do. Dr. Kozic then told Dr. Greenspan about what had occurred and he said that he would take care of it. He saw Dr. Greenspan speaking to Finley and she left his room. Dr. Greenspan later told him that he told her to stay out of his room. Dr. Kozic did not ask that Finley be disciplined for the incident, and she was not disciplined. During his fifteen years of employment with Respondent Dr. Kozic has made a couple of requests that dental assistants be transferred; although he was never specifically told that he had this authority, he did it because, "I thought it was part of my job."

Dr. Greenspan testified that in November, Dr. Peterson, one of the dentists at the facility, complained that dental assistant Nicolette Brown was rude and didn't show him the proper respect; he asked that she be transferred. In December

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[4] Prior to this situation, in January 1992, Greenspan gave Branch a written warning for latenesses. This warning does not mention Dr. Kozic. On March 6, 1992 he received another written warning from Dr. Greenspan, this time for his excessive telephone calls during working hours. This warning refers to the difficult situation that the phone calls have created for Dr. Kozic.

she was transferred to Dr. Oro. Shortly before this transfer, Dr. Oro complained that Finley, his dental assistant, spent too much time on personal telephone calls. Dr. Greenspan spoke to her and she was transferred to Dr. Peterson. Additionally, in February 1992 one of the dentists at the facility complained that dental assistant Brenda Bright was not attentive, and Dr. Greenspan transferred her to another dentist.

Dr. Greenspan testified that on a number or occasions, he has hired a dental assistant on the recommendation of a dentist. The one situation that he testified about involved Dr. Lea Bram, a dentist whom he hired in February 1995. Dr. Bram told him that she needed a dental assistant and recommended Jacqueline Wright, the assistant with whom she worked at her previous place of employment. Dr. Bram arranged for Wright to call Dr. Greenspan, and he told her that he had an opening for a dental assistant and asked if she would like to come to the facility for an interview. When he interviewed, he did not question her about her skills, because Dr. Bram had spoken so highly about her, and only spoke to her about salary, the working conditions, and the Local 153 contract. In hiring her, he "relied on her recommendation exclusively."

The Alleged Threat to Close

The Section 10(j) hearing before Judge McKenna took place on Friday March 17, 1995. Admittedly, on about March 14, 1995, Dr. Greenspan had conversations with some of the dentists at the facility about the affect that the injunction would have upon the continued viability of the facility. What distinguishes this case from the normal threat to close under *N.L.R.B. v. Gissel Packing Co., Inc.* 395 U.S. 575 (1969) is that in the instant case the statement that was made allegedly involved threats of action not by Dr. Greenspan, but by Vito Pitta, a trustee of the Dental Plan.

Dr. Mello testified that on about March 14, 1995, she and another dentist were at the facility talking about the injunction hearing; "We didn't know what it meant." Dr. Greenspan overheard the discussion and invited them into his office to talk about it. He told them that if the injunction was granted

he would have to recognize the Union, at least temporarily. They asked what it meant as far as their jobs were concerned:

> And he said that he didn't know. He said that he wasn't aware of what was going to happen to this clinic. He wasn't aware of what was going to happen to his job or our jobs. And he said he. . . had the union for a long time. . . he's been dealing with the union for a long time. And there never really was a problem. It just seems now there was. And it wasn't with him. He said it was maybe the man who hired him, Mr. Pitta. So, he didn't know which way it was going to go.

As to whether the injunction proceeding could have something to do with closing the facility, she testified: "He said he didn't know if it would. He said that Mr. Pitta was unhappy with our union, not a union per se, but our union. But he didn't know what he was going to do with that." The other doctor asked about other job possibilities for the dentists, but Dr. Greenspan did not have much to say on that subject.

Dr. Kozic testified that on March 14, 1995 everybody in the office was discussing the upcoming injunction hearing. Drs. Mello and Oro said that Dr. Greenspan said that Pitta would close the facility if the Union won the case. Dr. Kozic approached Dr. Greenspan and said, "I heard Vito's closing the office if Doctors Council wins the case." Dr. Greenspan said that he thought that he would lose the case and "that Vito was not going to deal with Doctors Council in any way, shape or form." He also said that the New York City Hotel and Motel Trades Council and Hotel Association of New York City, Inc. Welfare Fund, herein called the Welfare Fund, had built a large medical and dental office in Queens, New York, and "at this point, Vito doesn't need us anymore, and he could very easily close the office." On cross examination he testified that Dr. Greenspan said that Pitta *would* close the facility because he would not deal with the Union. Dr. Kozic then said that Respondent had a contract with the Dental Fund, and Dr. Greenspan responded that the contract was cancelable at

any time at the discretion of Pitta or the Dental Fund. Dr. Greenspan said that he was concerned that the facility was going to close, and that " the issue was more between Doctors Council and Vito, and not between the dentists and his recognition of the union itself, that he always got along. He always had a good working relationship with the union. And until Vito got upset with the Doctors Council, everything was fine."

Dr. Greenspan testified that a few days prior to March 14, 1995, he overheard a loud discussion at the facility among the dentists about the 10(j) proceeding. Because he felt that it was not appropriate that such a conversation take place in the vicinity of patients and other employees, he asked Drs. Mello and Oro to come to his office. He testified (through hearsay testimony not accepted for the truth of the matter) that a Dr. Mitchell, a dentist at the facility who was on maternity leave, had previously told him that she and Dr. Mello (who did not testify about such a conversation with Pitta) had met with Pitta. When the three were present in his office, Dr. Mello asked him what the Section 10(j) proceeding meant to them. He told them that he had a contract to provide dental services and intended to keep it. "What my client's position was going to be, with regard to it, I didn't know." Mello said that she had met with Pitta and that he made it clear that he did not want to deal with the Union. He testified further that on March 14, 1995, Dr. Kozic asked him, "What's going on with this 10(j) business?" He told him what he had told Dr., Mello and Oro a few days earlier; he did not tell him that he would close the office. He also told him that Pitta had the right to terminate the contract. Dr. Greenspan also testified that he had no conversation with Pitta or any other representative of the Dental Fund about the impact that a Section 10(j) injunction would have with his contract with the Dental Fund: "My only knowledge of the subject came from the two doctors that went to see him. And they reported to me on what Mr. Pitta told them." The agreement between Respondent and the Dental Fund is effective through December 31, 1995. It is provides that either party can terminate the agreement upon ninety days notice to the other, or can cancel on thirty days

written notice for "material breach" of the agreement. Finally, there was some brief testimony by Drs. Kozic and Greenspan that offices that had been operated by Dr. Greenspan in Brooklyn and on 47th Street in New York City were closed and taken over by either the Dental Fund or the Welfare Fund.

Analysis of Section 8(a)(5) Allegations

There are three separate, yet related, allegations involved herein. It is alleged that Respondent withdrew recognition from the Union by letter dated August 22 and since that time has failed and refused to recognize, or bargain with, the Union as the exclusive representative of its dentists, that subsequent to August 22, Respondent bypassed the Union and dealt directly with these employees concerning their terms and conditions of employment, and that on about September 6, Respondent unilaterally granted wage increases of $32 a day ($16 to Kozic) to each of its dentist in the unit, without prior discussion with the Union. Respondent admits that it engaged in these actions, but denies that they constitute unfair labor practices under the Act because all the unit employees herein constitute supervisors within the meaning of the Act.[5] In fact Respondent's August 22 letter to the Union specifically states that Respondent was refusing to bargain with the Union because the dentists it employs are supervisors within the meaning of the Act, especially in light of the Supreme Court's decision in *N.L.R.B. v. Health Care & Retirement Corporation of America,* 114 S. Ct. 1778 (1994), herein called the *Health Care* case. The issue therefor is simply whether the dentists employed at the facility are supervisors within the meaning of Section 2(11) of the Act.

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[5] Respondent denied the allegation contained in paragraph 10(b) of the Consolidated Compliant which alleges that the wage increase granted on September 6 relates to wages, hours, and other terms and conditions of employment of the unit, and is a mandatory subject of bargaining. It requires no case citations to conclude that wage increases are mandatory bargaining subjects, and I so find.

The *Health Care* case did not change the overall law regarding Section 2 (11) supervisors. Rather, as stated by Judge McKenna in his Memorandum and Order, the Court rejected the Board's interpretation of the phrase "in the interest of the employer", because patient care was the business of the employer in that matter, "and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer." The Court made it clear that it was not changing any other part of the law regarding Section 2(11) of the Act and impliedly was critical of what it considered to be the Board's rigidity in insisting upon the "in the interest of the employer" test, saying: "If the case presented the question whether these nurses were supervisors under the proper test, we would have given a lengthy exposition and analysis of the facts in the record." I will therefor determine whether Respondent's dentists are supervisors within the meaning of Section 2(11) under the "traditional" criteria.

The Board has been instructed that in interpreting Section 2(11), it must not "construe supervisory status too broadly, for a worker who is deemed a supervisor loses his organizational rights." *Westinghouse Electric Corp. v. NLRB,* 424 F.2d 1151, 1158 (7th Cir.1970); *McDonnell Douglas Corp. v. NLRB,* 655 F.2d 932, 936 (9th Cir. 1981). Additionally, it is the party alleging supervisory status, the Respondent herein, bears the burden of proving that such status exists. *Thayer Dairy Company, Inc.*, 233 NLRB 1383; *Tucson Gas & Electric Company*, 241 NLRB 181; *Health Care & Retirement Corp. of America*, 306 NLRB 63. The evidence that Respondent has attempted to produce falls into two categories. That these dentists responsibly direct the dental assistants and that they have the authority to effectively recommend the hire, transfer, suspension, assignment, or discipline of the dental assistants. The direction of the dental assistants will be discussed first.

Although there are no major credibility determinations herein, I found Dr. Kozic the least credible and convincing of

the witnesses at the hearing; he clearly had difficulty admitting to anything that he felt might assist Respondent's case. On the other hand, I found Dr. Greenspan, as well as Drs. Mello and Oro, to be credible and believable witnesses who appeared to be testifying in an honest and open manner. The evidence establishes that the dentists have the authority to "release" their dental assistants to make or receive telephone calls, to have a cup of coffee or to attend to brief personal business, and do so when they are performing a procedure where the dental assistant is not needed. In addition, the dentists ask (but cannot require) the dental assistants to work overtime with them, and ask the dental assistants to assist them in procedures in the absence of their regular assistant. Such activities clearly are not enough to constitute supervisory status. Section 2(11) requires that the direction of work be done "responsibly", and not be "of a merely routine or clerical nature, but requires the use of independent judgment." Telling an assistant that she can go for a cup of coffee is a routine assignment not requiring the use of independent judgment. As the Court stated in *N.L.R.B. v. Security Guard Service, Inc.* 384 F. 2d 143, 147 (5th Cir.1967): "Moreover, the statutory words 'responsibility to direct' are not weak or jejune but import active vigor and potential vitality."

More seriously, the evidence establishes that the dentists effectively recommend the transfer of dental assistants, in two situations recommended the termination or suspension of employees, and on one occasion effectively recommended the employment of an individual. Taking these in inverse order, Dr. Greenspan credibly testified that he relied on Dr. Brams recommendation in hiring Wright. He did not question Wright about her skills in the interview, because Dr. Bram had spoken so highly about her. Dr. Greenspan also testified that in deciding to first suspend and then terminate Ladson, his reliance on Dr. Wexley's "input was total." Since he did not work directly with Ladson, "I rely solely on what the doctor says about the assistants with regard to what action to take. . ." Williams suspension letter states that Drs. Mello and Greenspan had spoken to her about her poor performance.

Most clearly, however, it appears that the dentists effectively recommend the transfer of dental assistants. About a half hour after Dr.Mello told Dr. Greenspan that she could no longer work with Williams because she was not helping her, Williams was transferred to another job as none of the dentists wanted to work with her. After Dr. Oro told Dr. Greenspan that he did not want to work with Finley anymore, Dr. Greenspan immediately transferred her to another dentist. Dr. Greenspan testified that he transferred Brown to another dentist at the request of Dr. Peterson and transferred Bright after the dentist with whom she worked complained that she was not being attentive. Countering this testimony is the testimony of Kozic that Vetrone and Branch were transferred without any request on his part. He complained to Dr. Greenspan about both of them spending an excess amount of time on the phone, but did not request that they be transferred. In fact, after Vetrone was transferred, he wrote to Dr. Greenspan complaining about the transfer.

The credible evidence therefor establishes that on one occasion a dentist effectively recommend that a dental assistant be hired and that on three occasions dentists effectively recommended that the dental assistants then working with them be transferred to another dentist. I find less reliable and not as convincing Dr. Greenspan's testimony about Ladson. Contrary to this testimony is Dr. Kozic credible testimony that Vetrone and Branch were transferred from him without his knowledge and, with Vetrone, over his written objections.

It has often been said that it is "not the exercise of authority, but the delegation of authority which is indicative of the attributes of a supervisor." *NLRB v. Southern Seating Co.*, 468 F.2d 1345, 1347 (4th Cir. 1972); *NLRB v. Pilot Freight Carriers, Inc.*, 558 F. 2d 205 (4th Cir. 1977). However, in situations such as the instant matter where the dentists were never specifically notified, orally or in writing, that they had such authority, the frequency of execution of the authority is relevant to a determination of whether they had the requisite

authority and therefor, their supervisory authority. In *NLRB v. Lindsay Newspapers, Inc.*, 315 F.2d 709, 712 (5th Cir. 1963), the Court stated that "sporadic exercise of some supervisory authority does not of itself turn an employee into a supervisor." In *McDonnell Douglas, supra,* the Court stated: "Such an infrequent exercise of supervisory authority may reasonably be viewed as insufficient to render Section 2(11) applicable." In *Artcraft Displays, Inc.*, 262 NLRB 1233 at fn.7, the Board commented on a leadman's testimony that he had laid off employees out of seniority: "Even if leadmen do possess this authority, it is so restricted and exercised so sporadically that it is not an indicium of supervisory status." In *NLRB v. Orr Iron, Inc.*, 508 F. 2d 1305, 1307 (7th Cir.1975), on one occasion the alleged supervisor told an employee to do his work or to go home, and on another occasion, he sent an employee to the superintendent and told him of the employee's poor attendance. The Court stated:

> But these were incidental and extraordinary exceptions to Collins' regular practice, and when looked at against a total background do not in any way show that Collins had the authority to discipline or recommend the discipline of employees as one of his regular functions.

See also *Highland Superstores, Inc. v. NLRB,* 927 F.2d 927 F.2d 918 (6th Cir. 1991). The words of the Court in *Orr Iron, supra,* apply to the instant matter as well. The work of the employees herein is to perform dental work on Respondent's patients for about seven hours a day. If once a year they ask Dr. Greenspan to transfer their dental assistant to another dentist, and he follows that recommendation, these activities are "incidental and extraordinary exceptions" to their dental practice and does not, without more, make them supervisors within the meaning of the Act.

There is an additional reason why I find that they are not supervisors under the Act. A number of Board cases have found that when two people work together closely, what might otherwise be considered an indicia of supervisory

authority (the power to hire, fire, transfer or effectively to recommend such) is really a means of ensuring compatibility of the employees. *Willis Shaw Frozen Food Express, Inc.*, 173 NLRB 487 involved a driver and assistant driver who worked long hauls together. The driver had the authority to choose the assistant he wants to work with and, if he feels that the assistant is incompatible, the assistant is transferred to another driver. The Board found that the driver was a non-supervisory employee: "We are persuaded that the role they play in such matters is, under the Employer's policy, principally in their own interest to ensure a harmonious relationship between themselves and their assistants. . ." See also *Kenosha News Publishing Corporation,* 264 NLRB 270. In *Lipsey, Inc.*, 172 NLRB 1535 at fn. 2, the Board stated:

> . . . it has been the practice of Respondent, whenever possible, to grant the request by a welder for a particular helper, and to honor a welder's request that a specific individual be hired for such assignment. To the extent that this arrangement may be viewed as bestowing on welders authority to effectively recommend personnel action, it is basically a limited and personal authority excercised not "in the interest of the employer" but, as the Trial Examiner found, in their own interest to suit their own particular needs and desires.

In *Soil Engineering & Exploration Co., Inc.*, 269 NLRB 55, the Board, in finding that the employees were not supervisors within the meaning of the Act, quoted from *Southern Bleachery & Print Works,* 115 NLRB 787, 791:

> We have no doubt that almost any employer, when told by a skilled craftsman that his helper is incompetent and that he needs a new helper if he is properly to perform his functions, would accept the judgment of the craftsman. While this may be called effective recommendation, it is inherent in the craftsman-helper relationship . . .

Likewise, it is also inherent in the dentist-dental assistant relationship. For "four handed sit-down dentistry" to operate properly, the dentist must get along with, and have confidence in, the dental assistant that he/she is working with. Dr. Greenspan is correct that when a dentist asks him to make a change in his/her dental assistant he follows that recommendation because it is the dentist, not him, who worked with the dental assistant. But that alone should not, and does not, convert a dentist-unit employee into a supervisor within the meaning of the Act. It only means that the dentist wants to work with a dental assistant with whom he can work efficiently, and his employer agrees with that conclusion.

Finally, although the Supreme Court rejected one of the Board's criteria for supervisory status for nurses in the *Health Care* case, it approved another:

> To be sure, in applying Section 2(11) in other industries, the Board on occasion reaches results reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives. It is important to emphasize, however, that in almost all of those cases (unlike in cases involving nurses) the Board's decisions did not result from manipulation of the statutory phrase "in the interest of the employer", but instead from a finding that the employee in question had not met the other requirements for supervisory status under the Act, such as the requirement that the employee exercise one of the listed activities in a non-routine manner.

Similarly, the Board in *Golden West Broadcasters,* 215 NLRB 760, fn. 4, stated: "an employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor." And in *International Center for Integrative Studies,* 297 NLRB 601 at fn. 7: "In other contexts we have also found that the routine direction of employees based on a higher level of skill or

experience is not evidence of supervisory status." Most professional employees employed in a commercial setting have some authority over their subordinates pursuant to their training and positions. A finding that the dentists herein are supervisors within the meaning of the Act would severely limit the applicability of Section 2(12) of the Act.

For all of the above reasons, I find that the dentists employed at the facility are not supervisors within the meaning of Section 2(11) of the Act. I therefor find that since August 22, Respondent has violated Section 8(a)(1)(5) of theAct by withdrawing recognition from the Union, and by refusing to recognize and bargain with the Union, as the exclusive bargaining representative of its dentists. I also find that since August 22, Respondent violated Section 8(a)(1)5) of the Act by bypassing the Union and dealing directly with its dentists concerning wages and other terms and conditions of employment, and by unilaterally granting wage increases to its dentists on about September 6.

Analysis of Section 8(a)(1) Allegation

Admittedly, on March 14, Dr. Greenspan had conversations with several employees where he told them of the possibility that the facility would close if the Board were successful in the 10(j) proceeding before the Court on March 17. What makes this unusual is that Dr. Greenspan's "threats" were that another (Pitta) would (or might) cancel the agreement with him if the injunction was granted. As stated *supra,* I found Drs. Mello and Greenspan more credible that Dr. Kozic and, when there is a conflict, I would credit their testimony over his. Dr. Mello, who obviously was an impartial witness, testified that on March 14, Dr. Greenspan overheard her and another dentist disucssing the upcoming court hearing and called them into his office. When they asked him how it would affect their jobs, he said that he didn't know what was going to happen to the facility or their jobs and that he had no problem with the Union, he had been dealing with it for a long time. As to whether the court hearing could result in closing the facility, he told them that he did not know. "He

said that Mr. Pitta was unhappy with our union . . . But he didn't know what he was going to do." Dr. Greenspan testified that, in his conversation, the dentists told him of statements that Pitta had allegedly made, and they asked him what effect the injunction hearing would have on them. He told them that he did not know what Pitta would do. When Dr. Kozic spoke to him about the situation on March 14, 1995, he told him what he had told Dr. Mello and that Pitta had the right to terminate his contract. He also testified that he never spoke to Pitta or anybody from the Dental Fund about the court hearing.

In *Gissel, supra,* the Court stated:

> He may even make a prediction as to the precise effect he believes unionization will have on his company. In such case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the first amendment.

The credited testimony establishes that when Dr. Greenspan overheard some of the dentists discussing the situation at the facility, he called Dr. Mello and another dentist into his office and told them that he did not know what would happen with the facility, that he had no problem with the Union, the problem was with Pitta, who was unhappy with the Union. I find that Dr. Greenspan did not cross the line into impermissible threats under *Gissel.* He did not initiate these conversations; rather, he brought them into his office rather than a more

public area of the facility. When Mello spoke about her conversation with Pitta, which was not accepted for the truth of what was said, he told them that he did not know what Pitta would do. He never said that Pitta would not deal with him if the injunction was granted and never said that he would close the facility if the injunction was granted or that he would do anything as a result of the Court hearing. In fact, he told them that he had no problem with the Union. He basically said that he didn't know what would happen, that it was up to Pitta. These statements were carefully phrased statements that were based upon facts beyond his control. I therefor find that these are lawfully permissible statements and recommend that this allegation be dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time dentists employed by the Respondent at its facility, but excluding all other employees, clerical employees, guards, and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1)(5) of the Act by engaging in the following activities:

> (a) Withdrawing recognition from the Union as the exclusive bargaining representative of its dentists on August 22, 1994.
>
> (b) Failing and refusing to recognize or bargain with the Union as the representative of these employees since that time.

(c) Bypassing the Union and dealing directly with the employees since that time.

(d) Unilaterally granting wage increases to its employees on about September 6, 1994 without prior discussions with the Union.

5. Respondent did not further violate the Act as alleged in the Consolidated Complaint.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Principally, I shall recommend that Respondent be ordered to recognize and, upon request, bargain with the Union over the terms and conditions of employment of the dentists at the facility and, upon the request of the Union, to rescind the unilateral wage increases that it granted to its dentists on about September 6, 1994. However, nothing herein shall be construed as requiring Respondent to revoke the wage increases granted to the employees, absent the written consent of the Union.

Upon the foregoing findings of fact, conclusions of law and the enitre record, I hereby issue the following recommended

ORDER[6]

The Respondent, Robert Greenspan, D.D.S., P.C., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition from the Union as the exclusive collective bargaining representative of its

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employees in the following appropriate unit: all full-time and regular part-time dentists employed by the Respondent at its facility at One Penn Plaza, New York, New York, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to bargain with the Union as the exclusive bargaining representatives of its employees in the above described unit.

(c) Bypassing the Union and dealing directly with its employees concerning their terms and conditions of employment.

(d) Unilaterally changing the wages, or other terms and conditions of employment of these employees.

(e) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.:

(a) Notify the Union, in writing, that it recognizes the Union as the exclusive bargaining representative of the employees in the above described unit and that, upon request, it will bargain with the Union over the terms and conditions of employment of these employees.

(b) Upon the request of the Union, rescind the unilateral wage increases that it granted to its dentists on about September 6, 1994.

(c) Post at its facility copies of the attached notice marked "Appendix".[7] Copies of the notice, on forms

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[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED

(Footnote continued)

provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for sixty consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the Consolidated Complaint herein be dismissed insofar as it alleges violations not specifically found.

Dated, Washington, D.C. May 22, 1995.

/s/ Joel P. Biblowitz

Joel P. Biblowitz
Administrative Law Judge

PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD(NY)—48—95

APPENDIX

NOTICE TO EMPLOYEES

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from Doctors Council ("the Union"), or any other labor organization, absent a good faith doubt of the Union's majority status based upon objective considerations.

WE WILL NOT deal directly with our employees who are represented by the Union regarding their terms and conditions of employment, and **WE WILL NOT** unilaterally change their terms and conditions of employment without prior negoations with the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL forthwith notify the Union, in writing, that we recognize it as the exclusive bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time dentists employed at our facility located at One Penn Plaza, New York, New York, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

WE WILL, upon request, bargain with the Union about the terms and conditions of employment of these employees and, if agreement is reached, put said agreement in writing.

WE WILL, upon request, rescind the unilateral wage increase we granted to these employees on about September 6, 1994.

ROBERT GREENSPAN, D.D.S., P.C.

Dated _____ **By** _____
(Representative) **Title**

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 26 Federal Plaza, Room 3614, New York, New York 10278-0104, Telephone 212-264-0346.

Supreme Court, U.S.
FILED
JUL 30 1996
CLERK

No. 95-1945

In the Supreme Court of the United States

OCTOBER TERM, 1995

CORRECTED COPY

ROBERT GREENSPAN, D.D.S., P.C., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WALTER DELLINGER
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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's dentists are not "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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ROBERT GREENSPAN, D.D.S., P.C., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A1-A3) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. A4-A6), and the decision of the administrative law judge (Pet. App. A7-A34), are reported at 318 N.L.R.B. No. 5.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1996. A petition for rehearing was denied on May 24, 1996. The petition for a writ of certiorari was filed on May 31, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a dental clinic in New York City, employs (among other individuals) ten dentists and fifteen dental assistants. Pet. App. A9. Petitioner's dentists and dental assistants practice "four handed sit-down dentistry": the dentists perform general dentistry, including extractions, root canals, and filling cavities; the dental assistants, functioning as the dentists' "second set of hands," perform such tasks as retracting tissue, mixing materials, and aspirating fluids. *Id.* at A9-A10.

Before August 1994, petitioner had maintained a longstanding bargaining relationship with the Doctors Council (the Union), which it recognized as the exclusive collective-bargaining representative for its dentists. Pet. App. A8-A9. Petitioner's most recent labor agreement with the Union expired on December 31, 1993. On August 22, 1994, petitioner broke off negotiations for a new contract. Petitioner informed the Union that, in its opinion, the dentists were "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11),[1] and, accordingly, that it was under no legal

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[1] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and thus from the coverage of the Act, "any individual employed as a supervisor." Section 2(11) of the Act, 29 U.S.C. 152(11), defines "supervisor" to mean:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is

obligation to bargain with the Union regarding the dentists' terms and conditions of employment. Pet. App. A8. Subsequently, petitioner negotiated directly with the dentists and unilaterally granted them a wage increase. *Id.* at A8-A9.

2. On March 31, 1995, the General Counsel of the National Labor Relations Board (Board) filed a complaint against petitioner, alleging, among other things, that petitioner had violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), in refusing to bargain with the Union. Pet. App. A7, A21.[2] Petitioner defended its refusal to bargain on the ground that the dentists were statutory supervisors under Section 2(11). Pet. App. A21-A22.

On July 31, 1995, adopting the decision of an administrative law judge (see Pet. App. A7-A34), the Board held that "the bargaining unit dentists employed by [petitioner] are not supervisors within the meaning of Section 2(11) of the Act." *Id.* at A4-A5. It rejected petitioner's contention that the dentists were supervisors because they had the authority "effectively to recommend" the "transfer" of dental assistants. *Id.* at A5. The Board observed that "the dentists' authority to recommend that a dental assistant be transferred is a means of ensuring compatibility among employees who work closely together rather than an indication of supervisory status under

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not of a merely routine or clerical nature, but requires the use of independent judgment.

[2] Acting pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), the General Counsel also sought and obtained interim injunctive relief against petitioner in federal district court. The court's injunction, among other things, required petitioner to bargain with the Union pending the Board's resolution of the unfair labor practice complaint. Pet. App. A7-A8.

Section 2(11) of the Act." *Ibid.* The Board observed that, if an unsatisfactory working relationship developed between a dentist and a dental assistant, both employees "essentially have reciprocal rights to request transfers," and either was free "to ask for, or demand, a reassignment." *Ibid.* The Board further noted that petitioner had granted dental assistants' requests for such a transfer on at least two occasions. *Ibid.*

The Board also adopted an alternative ground for its determination that the dentists were not statutory supervisors. Pet. App. A5. The Board found that, even if (as petitioner urged) the dentists had authority "effectively to recommend" transfers of dental assistants with whom they worked, the dentists did so "too infrequently to establish supervisory status" for purposes of Section 2(11). Pet. App. A5. The Board pointed out that the evidentiary record contained only four instances in which a dentist had actually recommended that a dental assistant be transferred to another dentist; and two of those instances, the Board added, were "of limited probative value" because they occurred after petitioner had already withdrawn recognition from the Union. *Ibid.*

To remedy petitioner's unfair labor practice, the Board, among other things, ordered it to bargain, upon request, with the Union with respect to the dentists' terms and conditions of employment. Pet. App. A6, A32.

3. The court of appeals enforced the Board's order in an unpublished summary order (Pet. App. A1-A3), "substantially for the reasons stated in the decision and order of the Board." Pet. App. A3.

ARGUMENT

1. Petitioner does not challenge the Board's principal holding (Pet. App. A5) that the dentists' transfer rights are similar to the dental assistants' transfer rights and are therefore insufficient to confer "supervisory" status for purposes of Section 2(11). Rather, petitioner's sole contention (Pet. 3-4) is that the Board's *alternative* holding—that, regardless of the transfer rights of the assistants, the dentists exercised their own transfer authority "too infrequently to establish [statutory] supervisory status" (Pet. App. A5)—is erroneous. That is so, according to petitioner (Pet. 4), because "the plain reading of § 2(11) * * * deems anyone who possesses any of the indicia set forth in § 2(11) of the Act a supervisor, regardless of the frequency that their authority is exercised."

Even if petitioner's argument on this point were valid (which, as discussed below, it is not), this case would be an inappropriate vehicle for addressing it. Because petitioner has not challenged the Board's principal holding regarding the reciprocal transfer rights of dentists and dental assistants,[3] resolution of petitioner's challenge to the Board's alternative holding would not affect the outcome of this case.

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[3] That holding is consistent with the settled rule that a skilled employee's "power, indirectly, to bring about the transfer * * * of a helper whose work the [skilled employee] is not satisfied with" does not constitute an "effective recommendation" of transfer for purposes of Section 2(11). See *Ward-McCarty Hot Oil-Paraffin Service*, 171 N.L.R.B. 731, 733-734 (1968); accord *Southern Bleachery & Print Works, Inc.*, 115 N.L.R.B. 787, 791-792 (1956), enforced, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959); *Soil Engineering & Exploration Co.*, 269 N.L.R.B. 55, 55-56 (1984).

2. In any event, petitioner does not even allege that the court of appeals' summary order—to the extent that it may be construed to have sustained the Board's alternative holding—is in conflict with any decision of this Court or of another court of appeals. Cf. Sup. Ct. R. 10(a) and (c).[4] Rather, petitioner simply contends (Pet. 4), that "Congress has determined that the presence of any one of the twelve indicia of supervisory authority, which are expressly set forth in [Section] 2(11) of the Act, renders one a supervisor who is not entitled to the Act's protections," and that the court of appeals has "rewritten" Section 2(11) by "add[ing] an additional requirement—the frequency with which that authority is exercised—to the otherwise clear definition fixed by Congress."

As the Board recognized, however, "it is not the exercise of authority, but the delegation of authority which is indicative of the attributes of a supervisor." Pet. App. A25 (internal quotation marks omitted); see *id.* at A4 (adopting ALJ opinion). Thus, where an employer specifically delegates supervisory functions to individuals, those individuals are statutory supervisors, even if in practice they rarely exercise their authority. See, *e.g.*, *American Diversified Foods*,

114 S.Ct. 1778

[4] In *NLRB* v. *Health Care & Retirement Corp.*, ~~511 U.S. 571~~ (1994), this Court invalidated the Board's rule that "a nurse's supervisory activity is not exercised in the interest of the employer if it is incidental to the treatment of patients." *Id.* at 1782-1783. The Court made clear, however, that its holding "casts no doubt on Board or court decisions interpreting parts of [Section] 2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 1785. The present case involves the Board's construction of Section 2(11)'s phrase "effectively to recommend," not the phrase "in the interest of the employer."

Inc. v. *NLRB*, 640 F.2d 893 (7th Cir. 1981). But the occasional exercise of *de facto* supervisory authority does not itself confer statutory "supervisory" status. "A supervisor may be vested with plenary power and rarely exercise it, but one who engages in an isolated incident of supervision is not necessarily a supervisor under the Act." *NLRB* v. *Security Guard Service, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967); see also *Highland Superstores, Inc.* v. *NLRB*, 927 F.2d 918, 922 (6th Cir. 1991); *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1467-1468 (7th Cir. 1983); *NLRB* v. *Orr Iron, Inc.*, 508 F.2d 1305 (7th Cir. 1975).

Here, petitioner had *not* delegated to the dentists the authority to make effective recommendations regarding the transfer of dental assistants. Pet. App. A25 ("the dentists were never specifically notified, orally or in writing, that they had such authority"). Rather, the dentists are professional employees, whose job function is limited to "perform[ing] dental work on [petitioner's] patients for about 7 hours a day." *Id.* at A26. To the extent that, in the course of performing root canals, filling cavities, and the like, they recommend the transfer of dental assistants with whom they work, those recommendations are "extraordinary exceptions to their dental practice." *Ibid.* (internal quotation marks omitted); see also *id.* at A5. Thus, even if it were assumed that the court of appeals' decision necessarily rested on this alternative holding regarding the frequency of the dentists' transfer recommendations—which it does not—that decision still would raise no issue warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT GREENSPAN, D.D.S., P.C.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The National Labor Relations Board ("the Board") asks this Court to avoid review of its flaunting a long-standing and important labor policy set forth by Congress in the National Labor Relations Act ("the Act"). Congress has determined, in the Act, that in order to preserve industrial stability, employers are not required to bargain collectively with labor unions with regard to an employer's supervisory employees. The Board has recently been criticized by this Court for its treatment of supervisory status in the health care field. See *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571

(1994). Here, the Board ignores the plain meaning of the Act, and again misapplies the specific phrase "in the interest of the employer" in interpreting and applying part of Section 2(11) of the Act.

The questions presented by Petitioner challenge the entire holding of the Board, which found that the dentists in question lacked supervisory authority. The Board based its holding on two grounds, both of which are erroneous and both of which violate the clear meaning of the Section 2(11) of the Act and the long standing national policy enacted by Congress regarding supervisors. The two theories upon which the Board based its decision may be summarized as: (1) the compatibility theory, and; (2) the infrequency of exercise theory.

The Compatibility Theory

The Board reverts to its error in *NLRB v. Health Care, supra,* in attempting to equate the transfer rights of dental assistants in this case with the transfer rights of dentists. Dental assistants have the right to request transfer to another dentist for compatibility reasons which are based on their own self-interests and not in the interests of the employer, Dr. Greenspan. The Board agrees that dental assistants have no right to request or cause the transfer of a dentist. Dentists, however, have the right to effectively recommend the transfer of dental assistants, not for personal compatibility reasons, or in their own self-interest, but in the interests of their employer for what amounts to disciplinary reasons. The Board does not deny that the record below shows that dentists cause the transfer of dental assistants. The record below demonstrates several reasons given by dentists for recommending the transfer of dental assistants:

1. ". . . unprofessional and lackadaisical performance." (A-15)
2. ". . . she did not pay attention to what Dr. Mello was doing and was not properly assisting her." (A-15)
3. "She was not performing her job properly...." (A-16)

4. "I can no longer work with her. She is not helping me." (A-16)
5. ". . . she went back to her old ways [of not performing her work properly]." (A-16)
6. "She was not attentive." (A-16)
7. ". . . rude and did not show him the proper respect." (A-18)
8. ". . . spent too much time on personal telephone calls." (A-18)

These reasons are clearly not indicative of incompatibility, but smack of disciplinary motivation.

The Administrative Law Judge found (A-15) that the most frequent form of discipline at the facility was the transfer of dental assistants from one dentist to the other, or from one dentist to another position at the facility (A-15). The Board, thus, clearly erred in what it refers to as its "principal holding" (Brief in Opposition, at 5), that the dentists' transfer rights are similar to the dental assistants' transfer rights and are, therefore, insufficient to confer supervisory status for the purpose of Section 2(11). The Board continues its errant policy, exhibited in *Health Care*, *supra*, by failing to find that the existence and exercise of transfer rights by the dentists, is essentially disciplinary and is done in the interests of the employer, rather than for compatibility purposes, in the self-interest of the dentists.

It is basic labor law policy that an employer is not required to recognize and bargain collectively with a labor organization for its supervisory employees. Unless this Court corrects the Board's misapplication of Congressional labor policy, the Board will continue to thwart the policy objectives of Congress.

Infrequency of Exercise

As an alternative ground for holding that the dentists are not to be considered supervisors, the Board agreed with the Administrative Law Judge's conclusion that the dentists' authority to recommend transfer is exercised too infrequently

to establish supervisory status (A-3, 25). This holding violates the clear meaning of Section 2(11). Congress has not qualified Section 2(11) by requiring that any of the twelve indicia of supervisory status contained therein be exercised *at all* in order for supervisory status to be found. Rather, it is the *existence* of the authority to effectively recommend transfer, rather than its actual exercise, or the frequency of its exercise, that determines supervisory status. The Board agrees (Brief in Opposition at 6), that the existence of the authority to effectively recommend transfer is the critical fact but then proceeds to attempt to modify the principle by distinguishing between specific delegation of authority and "*de facto* supervisory authority", a distinction not enacted by Congress and one, which, if accepted, modifies the plain meaning of the Act. Furthermore, the Board's attempted distinction conflicts with the record below which demonstrates that the dentists did, in fact, exercise their authority, and the recognition by the Administrative Law Judge that the transfer of dental assistants by dentists was the most common form of discipline at the facility.

The Board is attempting to change the national labor policy enacted by Congress. Congress has not required that supervisory authority be exercised any specific number of times, or at all, for a finding of supervisory status to be made. Unless the Court grants the Petition, the Board will continue to violate the Act and the national labor policy intended by Congress.

Conclusion

The decision below cannot be squared with the National Labor Relations Act. Due to the enormous significance of the issues presented, this Court should grant the Petition for Certiorari.

Dated: New York, New York
August 28, 1996

Respectfully submitted,

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